80-1549

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NO. 80-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXPORTS STEVEDORE COMPANY, and TEXAS EMPLOYERS' INSURANCE ASSOCIATION, *Petitioners*

v.

MURL J. WINCHESTER and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an injury in a stevedore's gear room located nine and five blocks outside the nearest Port of Houston terminal gates and admittedly *not adjoining* navigable waters meets the situs requirement for Longshoremen's Act jurisdiction, which is met under the 1972 Amendments to the Act

> ". . . only if the disability . . . results from an injury occurring upon the navigable waters . . . (including any adjoining pier, . . . , terminal, . . . , or other adjoining area customarily used . . . in loading [or] unloading . . . a vessel)? 33 U.S.C. § 903(a).

2. Whether the Court of Appeals is free to extend the shoreside situs of the Longshoremen's Act to all areas meeting a maritime usage requirement, on the basis that "all of Houston is an 'area' that 'adjoins' navigable waters," excepting only "downtown Houston" and other "absurd" results inherent in its theory?

3. Whether the word "adjoining" in the Longshoremen's and Harbor Workers' Compensation Act's *situs* requirement has any substantive, geographic meaning for jurisdictional purposes, or may be judicially interpreted (or ignored) to refer only to the functional usage of the general neighborhood or vicinity in question?

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, the parties to the proceeding below and those at interest therewith in the matter are as follows:

1. Murl J. Winchester, Claimant-Respondent
2. W. Jiles Roberts, Counsel for Claimant
3. Texports Stevedore Company, Employer-Petitioner
4. Texas Employers' Insurance Association, Insurance Carrier-Petitioner
5. TTT Stevedores of Texas, Inc., Successor to Texports Stevedore Company
6. Director, Office of Workers' Compensation Programs, a Respondent Below

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v.

MURL J. WINCHESTER and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion rendered en banc by the United States Court of Appeals for the Fifth Circuit in the captioned matter on December 10, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit on Rehearing En Banc in the captioned matter is reported at 632 F.2d 504 (1980), and is reprinted as Appendix A to this Petition, *infra*, p. A-1, with the dissenting opinion beginning at 632 F.2d 518, *infra*, p. A-26. The order, dated February 23, 1978, granting Rehearing en banc is reported at 569 F.2d 428 and is reprinted as Appendix B hereto, *infra*, p. B-1. The panel opinion of

the Court of Appeals on rehearing is reported at 561 F.2d 1213 (5th Cir. 1977) and is reprinted as Appendix C hereto, *infra*, p. C-1. The origin l panel opinion is reported at 544 F.2d 245 (5th Cir. 1977), and is reprinted as Appendix D hereto, *infra*, p. D-1.

The opinion of the Benefits Review Board (the United States Department of Labor) is reported at 4 B.R.B.S. 447 and reprinted as Appendix E hereto, *infra*, p. E-1 and the opinions of the Administrative Law Judge are briefly noted at 3 B.R.B.S. 201 (ALJ) (1975), and are reprinted as Appendices F and G hereto, *infra*, pp. F-1 and G-1.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit on Rehearing En Banc was rendered on December 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTE INVOLVED

The relevant portion of the Longshoremen's and Harbor Workers' Compensation Act, as amended, is as follows:

> Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):
>
> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT OF THE CASE

This case squarely presents the issue of the *situs* requirement for Longshoremen's Act jurisdiction ashore under the 1972 Amendments to the Act. The Claimant-Employee was working as a gearman maintaining equipment used by his stevedoring employer in the loading or unloading of ships. For purposes of this case, it has been conceded that the Claimant and his Employer were engaged in maritime employment within the meaning of the status requirement for Longshoremen's Act jurisdiction.

The location of the Employee's accident, however, was outside any area contiguous to the navigable waters of the United States.[1] The Claimant was working in a gear-room or equipment maintenance building at 7336 Ave. N in the City of Houston. It was five and nine city blocks, respectively, outside the nearest gates to the Port of Houston Authority's controlled access pier, dockside warehouse and cargo handling facility, and thus outside the

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1. (Emphasis added throughout):
Administrative Law Judge Nevin: "Its location *outside a terminal* proper is not significant." App. G, p. G-9.
Benefits Review Board: "The Avenue N gear room *although five blocks from any wharf* was placed in a location that would provide easy access for the gear men to service vessels on both sides of the channel. It clearly played an integral part in employer's overall maritime enterprise *thereby* qualifying as an adjoining area under the Act." App. E, p. E-4.
Original 5th Circuit panel opinion: "Respondent's accident *did not occur on the dock or pier adjoining the Houston Shipping Channel* but at a gear room several blocks away." 554 F.2d at 247, App. D, p. D-5.
5th Circuit panel on rehearing: "Respondent's accident *did not occur on the dock or pier adjoining the Houston Shipping Channel* but at a gear room which, though five blocks away, adjoined the docks and associated buildings." 561 F.2d at 1213, App. C, p. C-2.

United States Customs Service cargo supervision checkpoints. No cargo was ever brought to the gearroom location of the Claimant's accident, and it is acknowledged that the gearroom itself does not adjoin the navigable waters. Dissenting opinion below, 632 F.2d at 519, Appendix A *infra*, p. A-30.

In addition to being physically outside the pier and cargo terminal area boundaries and being physically separated by distance not only from the navigable waters but also from the boundaries of the terminal area, the gearroom is separated from the waterfront area by intervening buildings, thoroughfares and activities of a diverse and non-maritime nature. As demonstrated by the exhibits in the record, the gearroom is located in a mixed residential and commercial area. Indicative of the area between the gearroom and the gates to the terminal area are the residences and school children (Resp. Exhibit 5), Helen's Bar and the Climax Club on 75th Street at Avenue N (Resp. Exhibit 11), and the various public streets, intersections, railroad tracks and unrelated business enterprises shown on the map and aerial photograph comprising Respondent's Exhibits 4 and 17, all of which intervene between the gearroom and the border of the dockside area[2] and none of which involve maritime employment within the meaning of the Longshoremen's Act.

In terms of discernable boundaries marking what area adjoins the navigable waters, the obvious dividing line is the Port Authority fence surrounding the pier and cargo terminal area to which access is controlled by security

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2. These exhibits are reproduced hereafter in this section to illustrate the nature of the case, *infra*, pp. 7 to 13.

check points at the gates such as that below at p. 9.[3] Within that area cargo moves without passing a Customs or security check point, but cargo cannot leave that area without having been cleared for delivery. Longshoremen move cargo onto and off of ships within this area, but longshoremen do not move cargo out of this area. In the present case the gearroom is not only outside the fence and gate boundary, it is further separated by distance and intervening non-stevedoring activities and facilities.

The Administrative Courts below considered the function of the gearroom in question and used the word "adjoining" in the statutory language as a conclusion rather than a criterion for coverage. The thrust of the Benefits Review Board's opinion below was that the gearroom "clearly played an integral part in Employer's overall maritime enterprise, *thereby* qualifying as an adjoining area under the Act." 4 B.R.B.S. at 450, Appendix E, *infra*, p. E-4 (emphasis supplied). As quoted by the Court of Appeals, the Board held "[A]n adjoining area must be deemed bounded only by its use as a maritime enterprise. * * *" 632 F.2d at 507. The Court of Appeals for the Fifth Circuit expressly considered and reconsidered the "definition of an 'adjoining area' or maritime situs," 632 F.2d at 506, Appendix A, *infra*, p. A-2, and divided sharply on precisely this question:

> whether the word "adjoining" as used by Congress in the jurisdictional language of the Longshoremen's Act has any geographic content or is measured only by *function* so long as a general neighborhood or vicinity standard is subjectively present on a case by case basis.

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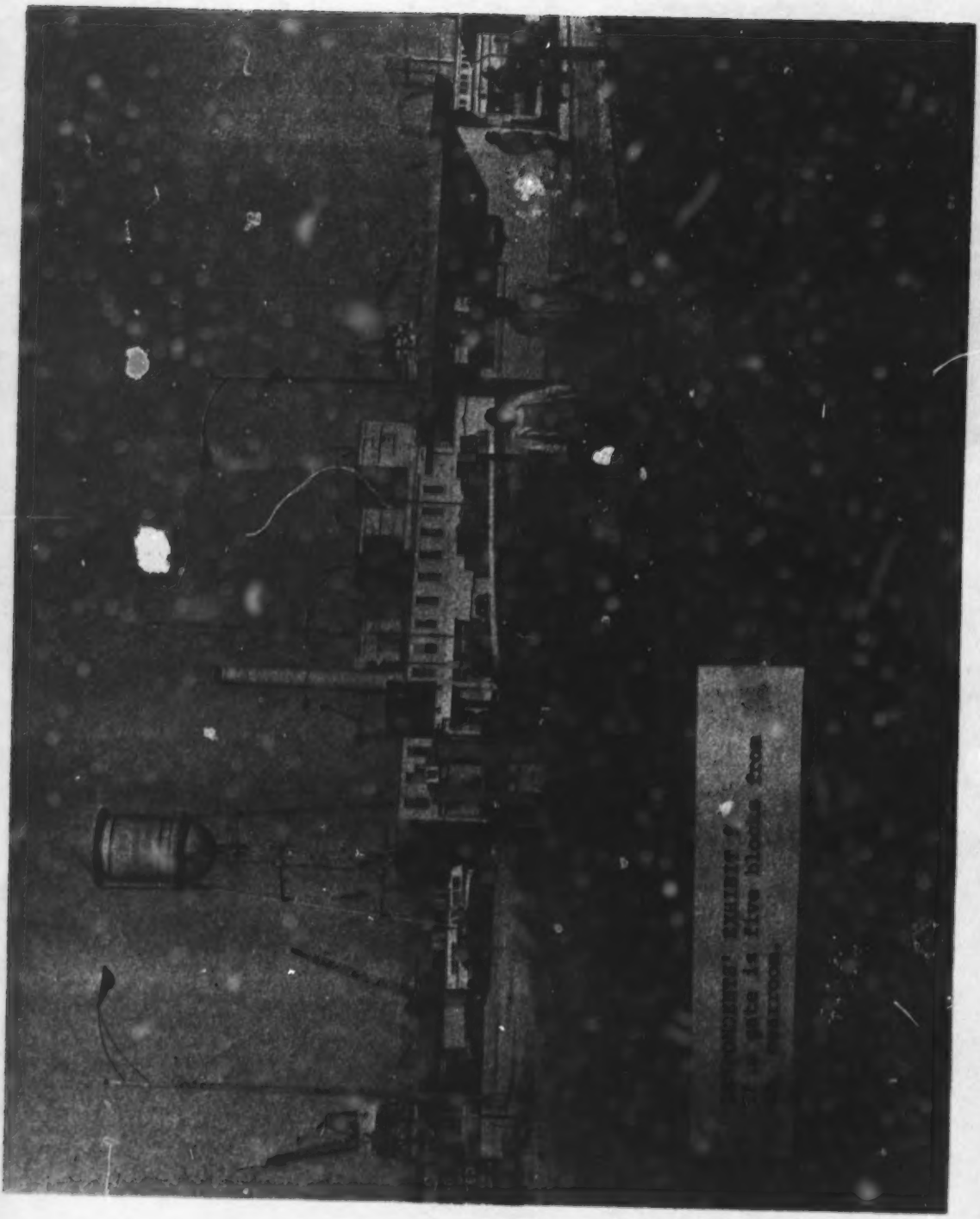
3. Petitioners do not contend that a fence line per se is necessarily the situs limit, but rather that in this case the pertinent fence is in fact the boundary of the area adjoining navigable waters and is therefore the boundary of shoreside situs.

The geographic, locational facts of the case are graphically illustrated by the following Exhibits.

Only the width of a public street separates the gear room from residential homes. See Respondent's Exhibit 5 reproduced on the opposite page in which two school children can be seen headed to or from their homes.



RESPONDENTS' EXHIBIT 5
TEXPORT STEVEDORE'S GARAGE/GELDROOT
74th Street at Ave. H



On the opposite page is shown a portion of the Respondent's Exhibit 4, on which is marked:

A. The gear room situs of the accident at 74th and Avenue N, shown as a red square.

B. The piers and cargo terminal areas adjoining the Houston Ship Channel are in the green striped area. The blue boxes are the entrance gates to this area closest to the gear room. The political, security and physical nature of these gates is shown in the photograph on page 9, *infra.*

C. In a straight line as the "crow flies" along the dotted line the gear room is separated from the navigable waters of the Houston Ship Channel, by

   a. Avenue N, a street open to and used by the general public;

   b. a commercial building;

   c. a single railroad track;

   d. vacant land;

   e. a single railroad track;

   f. additional vacant land;

   g. a group of seven (7) railroad tracks;

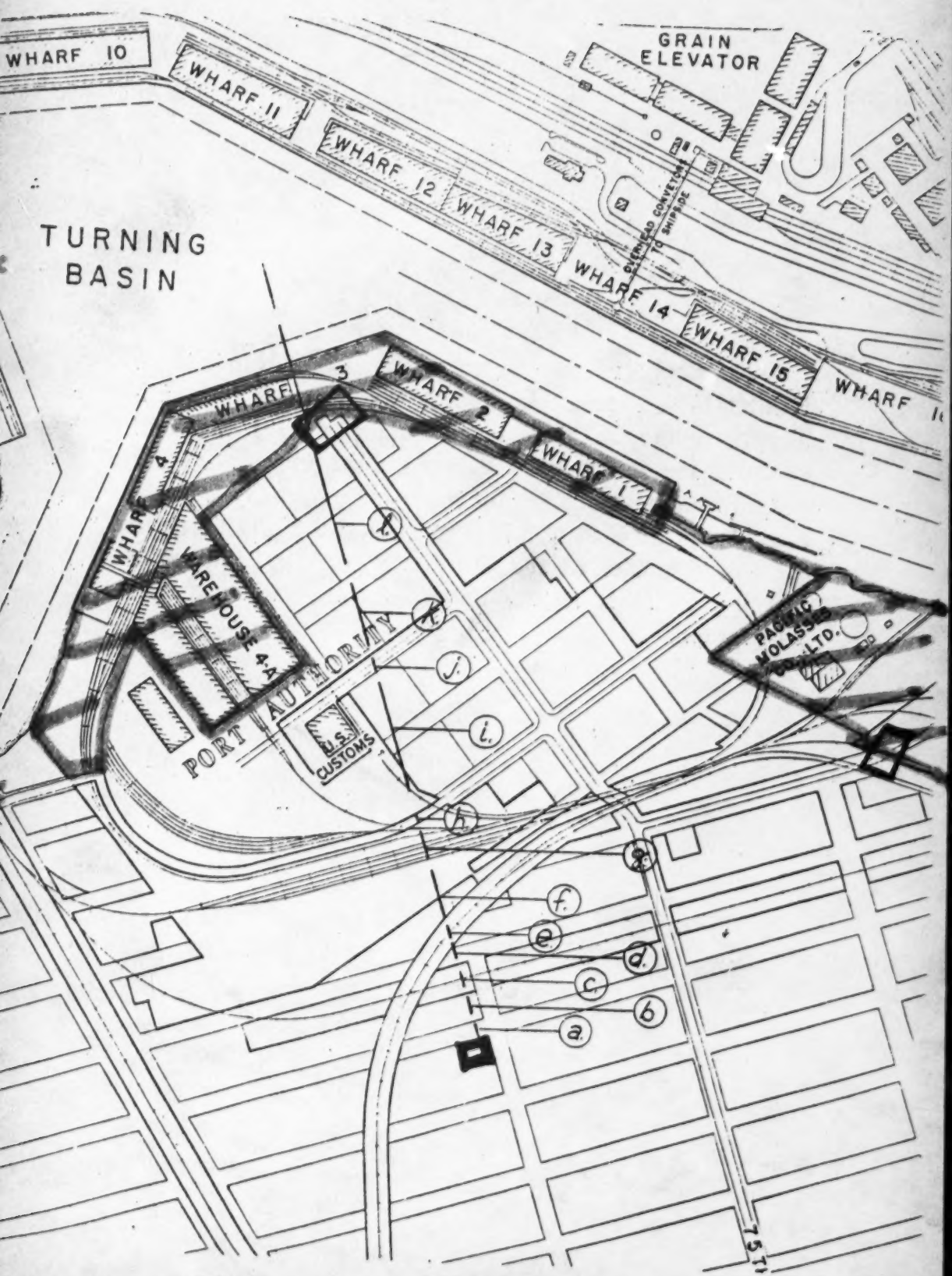
   h. Harbor Drive, a street open to and used by the general public;

   i. Houston Export Crating Office and Yard;

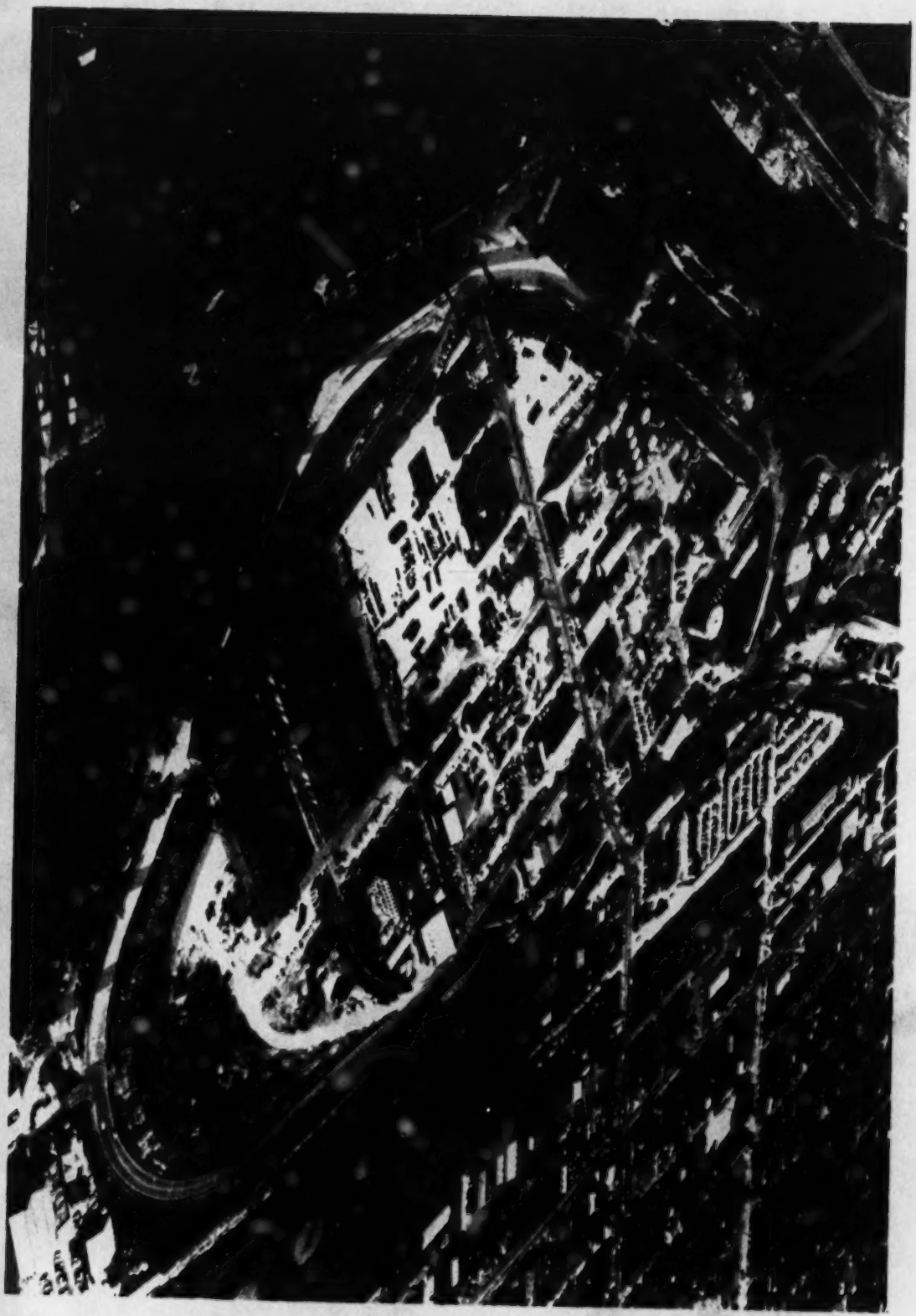
   j. Wingate Street, a street open to and used by the general public;

   k. Galveston Truck Lines Yard;

   l. Houston Export Crating parking lot and storage area.


WHARF 10
WHARF 11
WHARF 12
WHARF 13
WHARF 14
WHARF 15
GRAIN ELEVATOR
TURNING BASIN
WHARF 3
WHARF 2
WHARF 1
WHARF 4
WAREHOUSE 4-A
PORT AUTHORITY
U.S. CUSTOMS
PACIFIC MOLASSES CO. LTD.
a
b
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h
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On the opposite page is an excerpt from Respondent's Exhibit 17, an aerial photograph which covers substantially the same area as the map on the preceding page and confirms the information shown on the map. The gear room is the red square on the lower margin, the blue boxes are the nearest port terminal gates, and the green striped area corresponds to the same area on the map. The Turning Basin is in the upper lefthand corner of the photograph.



REASONS FOR GRANTING THE WRIT

1.

As emphasized by the strong dissent in the Court of Appeals en banc opinion (eight judges dissenting), the majority opinion below "effectively . . . read[s] the situs requirement out of the Longshoremen's Act" for jurisdictional purposes[4] although that requirement is mandated by the statutory language as the Court has held in *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977), and *P. C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979). In so doing, the opinion conflicts directly with the foregoing decisions of the Court which clearly hold that there are two co-equal requirements for Longshoremen's Act jurisdiction under the 1972 Amendments:

1. *Status*—the employee must be engaged in maritime employment, and
2. *Situs*—the injury must occur in a statutorily defined geographical area.

The Court has twice dealt with the first requirement—status—and substantially resolved all "status" questions related to the loading and unloading of vessels. The meaning of the equally important second requirement—situs—so blatantly expanded/disregarded by the court below, should also be settled by the Court.

2.

There is also a conflict on this situs issue between the opinion below and that of the Court of Appeals for the First Circuit in *Prolerized New England Company v.*

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4. 632 F.2d at 520, Appendix A *infra,* pp. A-30-A-31.

Benefits Review Board, ____F.2d____, 12 B.R.B.S. 808 (1st Cir. 12/23/80).[5] The First Circuit holds it is *not* enough for an injury to occur *near* a covered area, while the court below holds coverage would follow "so long as the site is close to or in the vicinity of navigable waters, or in a neighboring area."[6] Additionally, the First Circuit analyzed its situs problem in terms of a distinct terminal area (geographical) concept, declining to make situs distinctions on the basis of function,[7] ____F.2d at ____, 12 B.R.B.S. at 818, while the court below expressly adopted function rather than geographical location as the measure of situs.

3.

The importance of the extent to which Longshoremen's Act jurisdiction has been extended ashore by the 1972 Amendments is underscored by the Court's prior attention to the status requirement ashore, and equally requires that the situs requirement also be settled. Approximately fifty percent of the accidents reported under the Longshoremen's Act since the 1972 Amendments extended its jurisdiction ashore occur on shore rather than on vessels, and the uncertainty engendered by the Court of Appeals' disregard of the statutory language and its complete failure to articulate any standards for determining what is an "adjoining area" that meets the situs requirement, calls for prompt attention by the Court to settle this important issue.

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5. The pertinent portion of this opinion is reprinted hereafter as Appendix H, *infra,* p. H-1.

6. 632 F.2d at 514, Appendix A *infra,* p. A-20.

7. At least within the terminal area.

1. Conflict with the Decisions of the Court

"To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains injury *on the situs defined* by § 3(a)." *P. C. Pfeiffer Co. v. Ford,* 444 U.S. 69, at ____, 62 L.Ed.2d 225, at 231 (1979) (emphasis supplied). "The 1972 Amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to *both* the 'situs' of the injury and the 'status' of the injured." *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 264-265, 53 L.Ed.2d 320, 334 (1977) (emphasis supplied). In stark contrast, the Court of Appeals below holds that "[T]he perimeter of an area is defined by function. * * * It is an 'area' if it is customarily used by any statutory employer." 632 F.2d at 515, App. A *infra,* p. A-21. In the critical paragraph from which the foregoing, definitional sentences are taken, the statutory word "adjoining" does not once occur—it has been interpreted right out of the statute. If both status *and* situs are defined by function, there is no situs requirement, and the opinion below squarely conflicts with the decisions of the Court which hold that there are two tests: "status" determined by function, and "situs" determined by geographical location.

The Congress was scrupulous in retaining the word "adjoining" each time it referred to the shoreward extension of the Act, both in the statutory language and in the legislative history.[8] The word "adjoining" occurs no fewer than six times in the page and a half of the Committee Reports pertaining to shoreside jurisdiction, and the

8. S. Rep. 92-1125, pp. 12-13; H. Rep. 92-1441, pp. 10-11; 1972 U.S. Code Cong. and Administrative News pp. 4707-4708, reprinted *infra* in footnote 8 to the opinion below, Appendix A, pp. A-8 to A-10.

Senate Committee's introductory summary of the bill states that the intention was to "expand the coverage of this Act to cover injuries occurring in the *contiguous* dock area related to longshore and ship repair work." S. Rep. 2 (emphasis supplied). The Court in its *Caputo* opinion looked to the geographically contiguous terminal area (not merely to usage) in explaining how a particular location *within the terminal* met the situs requirement. *Caputo, supra,* 432 U.S. at 281.

Again in contrast, the court below indulges in the sophistry that any area may be both contiguous to and adjoining navigable waters if only the relevant area is defined broadly enough. 632 F.2d at 515. App. A, pp. A-20-A-21. The court below looks solely to the "usage requirement," cf. *Caputo, supra,* and gives no significance to the requirement that however used, a covered area must adjoin the navigable waters of the United States. The statutory language says "other *adjoining* area customarily used [etc.]" not merely "other area" so used. It is the failure to give any effect to this *"adjoining"* requirement of the statutory language that renders the opinion below useless as a guide to the shoreward extent of Longshoremen's Act coverage. If an employee's scope of employment were to have been the sole test of jurisdiction, wherever he might go, the word "adjoining" would have been omitted and there would be no situs requirement. Since the word adjoining is present in the statute, and scrupulously adhered to in the legislative history, and since the Court has twice held that a co-equal situs requirement does exist after the 1972 amendments, the opinion below is in clear conflict with both the statute and the Court's decisional law. A Writ of Certiorari should issue to correct this conflict and settle the issue of the applicable situs standard.

2. Conflict with the Decisions of Other Courts of Appeals

The Court of Appeals for the First Circuit has recently stated as follows regarding the situs issue:

> "* * * Plainly, the site of the injury must adjoin navigable waters, not a loading area as the Board would seem to have it. * * * The situs requirement is not satisfied merely because the injury occurred 'near' a covered area. * * *" *Prolerized New England Co., supra,* ____ F.2d at ____, 12 B.R.B.S. at 818, App. H, *infra.*

While the First Circuit eventually found that the site of injury before it was within a definite terminal and therefore covered under the *Caputo* analysis, the foregoing rationale is directly in conflict with the Fifth Circuit's decision in the opinion below, as follows:

> "So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWA." 632 F.2d at 514, App. A, *infra,* p. A-20.

Thus the Courts of Appeal for the First and Fifth Circuits have articulated diametrically opposed standards for determining the situs issue. The First Circuit holds "near" but not adjoining a covered area is not enough, while the Fifth Circuit says "close to or in the vicinity of" but not adjoining a covered area is adequate for coverage. A Writ of Certiorari should issue in this case to resolve this conflict between the Circuits.

Additionally, as noted by the dissenting judges below, the Fifth Circuit's overbroad "neighborhood" or "vicinity" approach is inconsistent with the analysis of the Court of

Appeals for the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978), although perhaps not with the holding. 632 F.2d at 519, App. A, p. A-29.

3. The Importance of this Issue

The area adjoining navigable waters situs issue is a most important one which needs to be resolved as promptly as possible. The exceptional importance of this need is illustrated by the fact that approximately fifty percent of all accidents reported under the Longshoremen's Act since the 1972 Amendments extended its jurisdiction ashore have ocurred on land and not on vessels. Until the jurisdictional situs line is drawn by a definitive decision on this adjoining area issue, countless cases will continue to plague the Federal Courts. It took the Federal and State Courts forty-two years to draw such a definitive situs line at the water's edge after the Longshoremen's Act was passed originally in 1927. Cf. *Nacirema Operating Co., Inc. v. Johnson*, 396 U.S. 212 (1969). Over eight years have passed since Congress extended the Act's jurisdiction to limited areas ashore which adjoin the navigable waters, but as noted above, the Courts of Appeals are still in conflict as to the appropriate standard to be employed. It is particularly unfortunate that the court below in this case has gone to great lengths to avoid accepting the Congressional standard measured by the word "adjoining," and adopted instead a case by case approach which is sure to engender continued and vexatious litigation. As the dissenting Judges said below:

> "The majority's interpretation of the situs requirement solved only Winchester's case; as respondent

> candidly admits, the adjoining area specified in 903(a) may well end one city block farther from the water than where Winchester was injured. * * * The majority does not clearly resolve that issue here. This Court very probably will, however, be called upon in the future to decide that very issue; until then, those injured parties still in the dark about the extent of their federal compensation remedy will suffer added expense and unnecessary delay." 632 F.2d at 519, App. A *infra*, pp. A-28-A-29.

While this conflict and uncertainty which breeds further and continuing litigation might be said to be good for the lawyers because of the fees it will produce for them, it is bad for everyone else; (1) the injured employee or his survivors who must litigate the issue before weekly compensation is paid; (2) the employer and its insurance carrier who must pay not only their own attorneys' fees and other costs of litigation, but those of the employees' attorney as well; (3) the American taxpayer who foots the bill for the administration of the Act and the litigation which arises under it; and (4) the Federal Courts whose dockets already bear an overwhelming load of litigation. Congress provided statutory language capable of clearly defining the shoreward extension of Longshoremen's Act situs coverage when it repeatedly used the word "adjoining." A Writ of Certiorari should issue in this case to implement the Congressional language and resolve this important jurisdictional issue. Any further delay in resolving this situs issue can only serve to compound and prolong the uncertainty and litigation. Only a definitive decision from the Court can ever eliminate them.

CONCLUSION

In view of the conflict of the decision below with the prior decisions of the Court and with the contemporaneous decision of the Court of Appeals for the First Circuit, in light of the considerations urged by the eight dissenting judges below, and particularly in order to resolve authoritatively the situs to which the Longshoremen's Act Amendments of 1972 extended federal jurisdiction ashore, Petitioners respectfully pray that the Court grant a writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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APPENDIX A

TEXPORTS STEVEDORE COMPANY
and Texas Employers' Insurance Association,
Petitioners,

v.

Murl J. WINCHESTER and Director, Office of
Workers' Compensation Programs
U.S. Department of Labor,
Respondents.

No. 76-4100

United States Court of Appeals,
Fifth Circuit.

Dec. 10, 1980

Appeal was taken from award of benefits made by the office of workers' compensation programs. The Court of Appeals, 554 F.2d 245 and 561 F.2d 1213 affirmed. On rehearing en banc, the Court of Appeals, Fay, Circuit Judge, held that worker who was injured in a gear room some five blocks from the waterfront, a building which was located as near the waterfront as feasible and whose operations were part of the ongoing overall loading process, which also involved two other gear rooms located on the docks was injured in an "adjoining area" and so met the situs requirement for coverage under the Longshoremen's and Harbor Workers' Compensation Act.

Affirmed.

Tjoflat, Circuit Judge, dissented and filed an opinion in which Coleman, Chief Judge, and Ainsworth, Roney, Gee, James C. Hill, Garza, and Randall, Circuit Judges, joined.

Petition for Review of an Order of the Benefits Review Board.

Before COLEMAN, Chief Judge, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

FAY, Circuit Judge:

We granted the petition for rehearing, 5th Cir., 569 F.2d 428, to reconsider the definition of an "adjoining area" or maritime situs under 33 U.S.C. § 903(a) (1976) of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. The prior decisions, 5th Cir., 554 F.2d 245; 5th Cir., 561 F.2d 1213, finding that the claimant was injured at a maritime situs are affirmed.

I. *FACTS AND PROCEEDINGS*

Respondent Murl J. Winchester was a Longshoreman employed as a "gear man" by petitioner Texports Stevedore Company. Texports maintained three "gear rooms,"

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* Judges John R. Brown and Jerre S. Williams took no part in the decision of this case.

or facilities for the storage and maintenance of gear,[1] in the vicinity of the Houston Shipping Channel Docks.[2] All three gear rooms were supervised by the same shop foreman. Two of the gear rooms were on the docks. Because those gear areas could not be expanded, and because the docks had insufficient space for an additional gear room, Texports' third gear room is on Avenue N, five blocks from the gate of the nearest dock. This third gear room is as close as Texports could get to the docks. Port Authority property extends to within about a half block from the gear room. Other Houston stevedores also must locate gear rooms outside the docks' gates.[3]

Winchester would report to the Avenue N gear room where he was given his daily work assignment. His duties as a gear man included supplying and repairing the tools and machinery used by stevedores in loading and unloading ships. His work was performed at the dockside, on board ships, and at each of the gear rooms, including those of other stevedores. When Texports was loading and unloading cargo, Winchester would service several ships, travelling over the public streets connecting the gear rooms and docks. Even when Texports had no ships to load or unload, the gear rooms operated repairing and

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1. "'Gear' includes such things as spreader bars, pallets, wire cable slings, tow motors, forklifts, etc. It is the equipment used by stevedores to perform the loading operation." Decision and Order of Administrative Law Judge, App. at 11.

2. The record has conflicting testimony on whether Texports had three gear rooms or two gear rooms and two lockers. Texports had gear at City Docks No. 43, 45, and 27, and at the Avenue N location. The Benefits Review Board ALJ state there were three gear rooms. *Winchester v. Texports Stevedore Co.*, 4 B.R.B.S. 447, 448 (1976); Decision and Order of Administrative Law Judge, App. at 11-12.

3. *See* Appendix I, and exhibit not available to the ALJ but supplied by petitioners on rehearing en banc.

maintaining gear for the next loading and unloading operation.

On June 3, 1974, while in the course of his employment for Texports, Winchester tripped and fell against a forklift at the Avenue N gear room, striking his face. Winchester filed a claim for compensation for serious facial disfigurement under the Longshoremen's and Harbor Workers' Compensation Act (LHWA). The Administrative Law Judge (ALJ) denied his disfigurement claim, but held Texports liable for Winchester's medical expenses and attorney's fees. Decision and Order of ALJ, App. at 9-21.

On appeal by petitioners, the Benefits Review Board (the Board) affirmed the Administrative Law Judge's decision. The LHWA's two-pronged test for coverage requires the injured claimant to have been an "employee" engaged in maritime employment[4] at a situs specified in the Act.[5] The Board held that Winchester was an "em-

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4. When used in this chapter—

. . . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3) (1976).

5. Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 903(a) (1976).

ployee" injured in an area under the LHWA. Decision of the Benefits Review Board, App. at 1-6, *reprinted in Winchester v. Texports Stevedore Co.*, 4 B.R.B.S. 447, 449-51 (1976). As to the situs, the Board stated:

> [A]n adjoining area must be deemed bounded only by its use as a maritime enterprise. *Maxin v. Dravo Corp.*, 2 B.R.B.S. 372 [(1975), aff'd, 545 F.2d 374 (3d Cir. 1976)]. The Avenue N gear room although five blocks from any wharf was placed in a location that would provide easy access for the gear men to service vessels on both sides of the channel. It clearly played an integral part in employer's overall maritime enterprise thereby qualifying as an adjoining area under the Act.
>
> . . . . .
>
> Further, the 1972 amendments to the Act were enacted in part to eliminate the circumstance of having persons engaged in maritime employment walk in and out of coverage during the workday. *Stockman v. John T. Clark & Son of Boston, Inc.*, [539 F.2d 264, 274 (1st Cir. 1976)]; *Dellaventura v. Pittston Stevedoring Corp.* [*Pittson Stevedoring Corp. v. Dellaventura*], [544 F.2d 35, 54 (2d Cir. 1976)]. A narrow reading of the situs requirement in the instant case would be contrary to this purpose of the Act.

Id. at 4-5; B.R.B.S. at 450-51.

A panel of this court affirmed the Board. *Texports Stevedore Co. v. Winchester*, 554 F.2d 245, *as modified*, 561 F.2d 1213 (1977). After noting the policy of liberal construction, the presumption of coverage, and the scope of review of Board decisions, the panel held that the Board properly determined that Winchester was an "em-

ployee." *Id.* at 247.[6] Turning to the gear room, the panel held that it was a maritime situs:

> Respondent's accident did not occur on the dock or pier adjoining the Houston Shipping Channel but at a gear room which, though five blocks away, adjoined the docks and associated buildings. See *Alabama Dry Dock and Ship Building Co. v. Kininess,* 554 F.2d 176, 178 (5th Cir. 1977).

561 F.2d at 1213.[7]

On petition for rehearing en banc, petitioners argue that the panel's assertion that the gear room "adjoined the docks and associated buildings" is factually inaccurate. Furthermore, they argue that the panel ignored the statute's requirement that the situs adjoin "navigable waters," not just a facility that in turn is next to water. Petitioners

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6. On the day of the injury Texports was not loading or unloading vessels. The Board held nevertheless that Winchester was an "employee" because his activities as a gear man were an integral part of an overall, continuing longshoring operation. *Winchester v. Texports Stevedore Co.,* 4 B.R.B.S. 447, 449 (1976). The Supreme Court has confirmed that "maritime employment" may include jobs with duties carried out solely on land. *P. C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 76-80, 100 S.Ct. 328, 334-336, 62 L.Ed.2d 225 (1979).

7. The language in the original panel opinion, which was withdrawn and modified as it appears above, was as follows:

> Respondent's accident did not occur on the dock or pier adjoining the Houston Shipping Channel but at a gear room several blocks away. Bearing in mind the test expounded by Judge Tjoflat in *Perdue,* it is clear that the N Avenue gear room, housing the gear used in loading and unloading cargo from ships, was a situs customarily used for maritime purposes as provided by the statute. Acknowledging the distance from the gear room to the water, we cannot, after giving the Act a liberal construction, reverse respondent's coverage just because the harbor area provided inadequate facilities for Texports to house their equipment.

554 F.2d at 247.

also assert that the panel opinion is inconsistent with two prior opinions of this court, *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir.), *cert. denied,* 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977) and *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976).

The case was reargued before the en banc panel in June, 1980. In its supplemental brief, petitioners assert that the *Alabama Dry Dock* test provides certainty of coverage while meeting the congressional objective of expanding coverage. Petitioners also claim that the legislative history supports restricting situs to facilities strictly "contiguous" to "navigable waters."

Although we recognize the merit of some of petitioners' positions, we decline their invitation to constrict the broadened coverage of the LHWA by corseting the areas eligible as maritime situses.

II. *THE 1972 AMENDMENTS TO THE LHWA*

In 1917, the Supreme Court held that maritime employees injured seaward of the water's edge could not be covered by state workers' compensation schemes. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 214-18, 37 S.Ct. 524, 528-529, 61 L.Ed. 1086 (1917). Although later cases softened the *Jensen* line, this ruling left many longshoremen injured over water without a compensation remedy. *See Sun Ship, Inc. v. Pennsylvania,* ____U.S.____, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980). To fill the gap left by *Jensen.* Congress enacted the 1927 LHWA to cover injuries occurring "upon navigable waters." Although Congress constitutionally had the power to compensate maritime injuries occurring on land, the Court

limited the LHWA's scope by interpreting the waterline to be its point of cleavage. *Nacirema Operating Co., Inc. v. Johnson,* 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969). In general, longshoremen's injuries on land were covered by state law and those over water were covered by federal law.

Congress later attempted a general overhaul of the LHWA which resulted in the 1972 amendments to the statute. One major change was an increase in federal benefits. This increase, however, created quite a disparity between the federal benefits and many states' compensation benefits. H. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972) and S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972), *reprinted* in 1972 U.S. Code Cong. & Ad. News pp., 4698, 4707-08 (hereinafter H. Rep.).[8]

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8. The House and Senate Committee Reports contain identical language on the broadening of LHWA jurisdiction under the 1972 amendments, which reads in full as follows:

EXTENSION OF COVERAGE TO SHORESIDE AREAS

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

To make matters worse, most State Workmen's Compensation laws provide benefits which are inadequate; even the better State laws generally come nowhere close to meeting the National Commission on State Workmen's Compensation Laws recommended standard of a maximum limit on benefits of not less than 200% of statewide average weekly wages. The following are the maximum limits on the compensation payable for permanent total disability in some maritime States:

California	$70.00
Florida	56.00
Hawaii	112.50
Louisiana	49.00

Besides this general disparity, many states supplied what Congress considered to be totally inadequate benefits.

Maryland	85.68
Massachusetts	[1] 77.00
New Jersey	101.00
New York	80.00
Oregon	62.50
Pennsylvania	60.00
Texas	49.00

[1] Plus $6 for each dependent.

Also, under the laws of some states due to exemptions based upon the number of employees hired some workers might be uncovered in the event they are unfortunate victims of an injury.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longeshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel,

H. Rep. at 10. As the LHWA stood, the amount of benefits received depended upon "the fortuitous circumstance of whether the injury occurred on land or over water." *Id.* Technology had heightened this factor of chance by enabling much of the work traditionally handled over water to be moved on shore. *Id.* Many Longshoremen moved continually from shore to sea, in and out of state and federal coverage, during the day.

[1] To effectuate a uniform compensation system for those who would be covered by the LHWA for part of their activity, Congress moved the jurisdiction line landward to cover

> an injury occurring upon the navigable waters of the United States (including any adjoining pier, dry dock, terminal, building way, marine railway, or

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just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

H. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972), *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4707-08. In addition, the Senate Report states in its summary:

> The bill also expands coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work.

S. Rep. No. 92-1125, 92d Cong., 2d Sess. 2 (1972).

other adjoining area customarily used by an employer in loading, repairing, or building a vessel).

33 U.S.C. § 903(a) (1976); H. Rep. at 11. Congress did not, however, intend to cover all people who happened into a maritime area. H. Rep. at 11. Congress therefore added a status requirement so that the LHWA would cover only persons "engaged in maritime employment." 33 U.S.C. § 902(3) (1976). The 1927 LHWA contained only a water's-edge situs test for jurisdiction. The 1972 amendments created a two-prong test covering a broader area but requiring a connection to maritime employment.

III. *CAPUTO AND PFEIFFER*

The Supreme Court has addressed the LHWA's expanded coverage twice since the 1972 amendments, but neither opinion tangles with the thornier problems of the new situs test. The cases do impart, however, the proper approach to resolving the problems: "The language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage." *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 268, 97 S.Ct. 2348, 2359, 53 L.Ed.2d 320 (1977) (hereinafter *Caputo*). In *Caputo,* the Court rejected the "point of rest" theory and held that a checker and terminal laborer were employees engaged in maritime employment under the LHWA. One employee was injured in a terminal area which his employer conceded was a maritime situs. The other employee was injured on one of two "finger-piers" at a fenced-in facility on the water. Although one pier was used for loading and unloading, since the employee was injured at the pier used only for strip-

ping and stuffing containers, the employer argued that the pier was not a situs "customarily used by an employer in loading [and] unloading. . . ." The Court began by expressing doubt that the phrase "customarily used" in the LHWA modified "pier" as well as "other adjoining area." The Court held that even if the phrase did modify the preceding terms the pier was part of a "terminal" which was customarily used for loading and unloading.

[2] In *P. C. Pfeiffer Co., Inc. v. Ford,* the Court refused to define "maritime employment" as requiring that the employee could, at some time during the day of injury, have been assigned to work upon the navigable waters. 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) (hereinafter *Pfeiffer*). In rejecting the argument that "maritime employment" had a geographic component, the Court noted that geography does play a role in the situs test and in the definition of "employer," 33 U.S.C. § 902 (4) (1976).[9] These features and the legislative history caused the Court to conclude that "maritime employment" focuses on the employee's occupation, not his potential location. The inquiry is whether the claimant is engaged in or spends some of his time in activities traditionally performed by longshoremen. 444 U.S. at 80 & n.18, 100 S.Ct. at 336 & n.18. Union jurisdiction and the employer's whim are not definitive on whether activities are "maritime employment." The Court concluded that its inter-

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9. A statutory employer is
> an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4) (1976).

pretation served the congressional purposes of expanding coverage, applying uniform standards, covering on-shore maritime duties, and reducing the number of employees walking in and out of coverage without granting LHWA coverage to all those within the situs area.

IV. *FIFTH CIRCUIT PRECEDENT*

In *Caputo* and *Pfeiffer*, the employees were all injured in one of the seven specific places listed in section 903(a): upon the navigable waters, or at an adjoining pier, wharf, dry dock, terminal, building way, or marine railway. Winchester's injury, however, did not occur at one of these sites. To be covered, his injury must have occurred at the section's general situs, an "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."

Prior to this case, this court had interpreted "other adjoining area" in two opinions. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976) (*Jacksonville Shipyards*), reviewed the decisions on five claimants.[10] The panel began its discussion of situs by stating it

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10. The five cases are *Jacksonville Shipyards, Inc. v. Perdue*, No. 75-1659, *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977), *aff'd on remand*, 575 F.2d 79 (5th Cir. 1978), *cert. denied*, 440 U.S. 967, 99 S.Ct. 1520, 59 L.Ed.2d 784 (1979) (Blackmun, J., dissenting) (*Perdue*); *Jacksonville Shipyards, Inc. v. Skipper*, No. 75-2833 (*Skipper*); *P. C. Pfeiffer Co., Inc. v. Ford*, No. 75-2289, *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2966, 53 L.Ed.2d 1088 (1977), *aff'd on remand*, 575 F.2d 79 (5th Cir. 1978) *aff'd*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) (*Ford*); *Halter Marine Fabricators, Inc. v. Nulty*, No. 75-2317, *cert. denied*, 433 U.S. 908, 97 S.Ct. 2793, 53 L.Ed.2d 1092 (1977) (*Nulty*); *Ayers Steamship Co. v. Bryant*, No. 75-4112, *vacated and remanded*, 433 U.S. 904 (1977), *aff'd on remand*, 575 F.2d 79 (5th Cir. 1978), *aff'd sub nom. P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979) (*Bryant*).

would look past the nomenclature of an employer or local custom and examine the facts to determine whether a situs is actually one "customarily used by an employer in loading, unloading, repairing, or building a vessel."[11] In one of the cases, *Ford*, the parties conceded the situs question. 539 F.2d at 543. In *Nulty*, the employee was a carpenter at a shipyard injured at a "fabrication ship [*sic*-shop?]" three hundred feet from the new ship on which he was working. The panel did not discuss the application of the situs test. *Id.* at 543-44. In *Bryant*, the panel held that a pier-side warehouse used for temporary storage of cargo before loading was a situs under section 903(a). *Id.* at 544. In *Skipper*, the panel decided that a ship repairer assigned to dismantle a building at an abandoned marine shipbuilding facility was neither engaged in maritime employment nor injured at a maritime situs since the facility was not presently being used for shipbuilding. *Id.* at 542-43.

The most extended discussion of "adjoining area" came in *Perdue*. Perduce injured his knee when he fell while leaving the bus supplied by his employer to take employ-

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11. Two other characteristics of maritime situs listed by the panel are called into question after *Caputo* and *Pfeiffer*. The panel indicated that all sites must be "customarily used" for maritime purposes, but the Supreme Court has expressed doubt over whether the "customarily used" language applies to the seven specific sites as well as the general one. *Caputo*, 432 U.S. at 280, 97 S.Ct. at 2365. Because "other adjoining areas" must clearly be "customarily used" we do not opine on the reach of this modifier. The panel also stated, "As with the 'maritime employment' test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury," not at some past or contemplated future time. 533 F.2d at 541. In *Caputo*, however, the Supreme Court rejected the timing requirement for "maritime employment." 432 U.S. at 273-74, 97 S.Ct. at 2362. Although the panel's stated basis for implying a time requirement for situses has been undermined, we do not suggest that there might not be other grounds for the requirement. The issue is not presented by this case.

ees to the office for checking out on the time clock. The court stated:

> In our view, the Board should have sustained the Administrative Law Judge's determination that Perdue was not injured on a situs defined by new Section 903(a). There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel upon which Perdue was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuilding. [The parties have stipulated that the nearest body of water was 500 yards away from the office.] Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix at 19). Therefore we must reverse the Board's determination that Perdue is entitled to compensation under the new Act.

Id. at 541-42 (footnote added to text). The office was not an "adjoining area customarily used" for maritime purposes.

The second discussion of "adjoining area" came in *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176 (5th Cir.), *cert. denied,* 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977) (*Alabama Dry Dock*). The

employee fractured his pelvis while sandblasting a disassembled crane. The Court stated:

> *Alabama Dry Dock* cites language in the statute which defines the situs as one "adjoining" navigable waters. The company argues that because the back lot in which the crane was stored did not abut the water, it is not a maritime situs. The record does not disclose the position of the lot, and the estimates in the briefs place it from 150 to 2,000 feet from the water's edge. In any event, the physical distance is not decisive here. The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding. *See Perdue, supra,* 539 F.2d at 542. Furthermore, the lot itself was "customarily used" for the maintenance and repair work engaged in by Kininess. It was an area in which work directly related to shipbuilding was taking place. *Cf. Stewart v. Brown & Root, Inc.,* 5 B.R.B.S. 37 (ALJ) (Sept. 30, 1976) (worker in shipyard under construction not covered.)

Id. at 178. The court held that even though the back lot did not touch water, it was in a contiguous shipyard area which was "customarily used" for maritime purposes.

Petitioners argue that the panel's decision in this case ignores the holdings of *Jacksonville Shipyards* and *Alabama Dry Dock*. Petitioners interpret these cases as stating that the point at which the injury occurs must not be separated from the water by any building used for non-maritime purposes. We disagree.

In *Jacksonville Shipyards,* the office was "purely clerical and administrative." 539 F.2d at 542. It therefore

was not a building "customarily used by an employer in loading, unloading, repairing, or building a vessel." *Id.* The nonmaritime character of the office was also the basis of the ALJ's opinion. The court did note that the office was "separated from the waters by other facilities which likewise were not [so] used." *Id.* Although non-maritime character of nearby building may be a factual indicator of "customary use," it is not a conclusive test for determining LHWA jurisdiction.[12]

In *Alabama Dry Dock,* the absence of nonmaritime facilities between the lot and the water was listed as a factor favoring coverage. 554 F.2d at 178, *citing Jacksonville Shipyards,* 539 F.2d at 542. Nevertheless, just as the presence of nonmaritime buildings is not a per se barrier to jurisdiction, the absence of nonmaritime facilities does not automatically signal coverage. The court looked at all the factors in determining that the back lot was a maritime situs in an adjoining shipbuilding area customarily used for building vessels.

[3] We reject the position that the presence or absence of nonmaritime buildings between the point of injury and the water is an absolute test for whether an injury is covered under the LHWA. Such a rule would introduce into the tests for coverage a new fortuity that would frustrate the congressional objective of providing a uniform system expanding coverage to landward maritime sites. The character of surrounding properties is but one factor to be considered in determining whether a site is an "adjoining area" under the LHWA. *See Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137, 141 (9th Cir. 1978). Variations in the purposes for which the area is used will not necessarily preclude coverage.

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12. On the point of injury approach, see § V *infra.*

We therefore do not agree that Fifth Circuit precedent required a holding that in the absence of an uninterrupted line of maritime facilities between the locus of the injury and the water, no LHWA jurisdiction is present.[13] Although some buildings near the gear room were of a non-maritime character, this fact alone does not require reversal of the ALJ's decision.

V. *ADJOINING AREAS*

[4] The question remains, however, whether we are developing a maritime situs rule broader than that envisioned by Congress. Congress was motivated by a desire to cover maritime operations occurring on land and to provide continuous, uniform coverage for employees who otherwise would have been covered for only part of their activities.[14] The best way to effectuate the congressional purposes is to determine the situs question by looking at all the circumstances.

[5] The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area. *Jacksonville Shipyards,* 539 F.2d at 541. Just as we disapprove of a test that disposes of the question based totally on the presence or absence of intervening or surrounding maritime facilities, we also reject the idea that Congress intended to substitute for the shoreline another hard line. Growing ports are not hemmed in by fence lines; the Act's coverage should not be either. All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case to downtown

13. We do, however, reject the point of injury approach taken in the *Perdue* case in *Jacksonville Shipyards. See* § V *infra.*

14. For the committee reports, see note 8 *supra.*

Houston. The site must have some nexus with the waterfront.

Petitioners assert that the gear room does not meet the statutory test because it does not abut the water. Under petitioners' interpretation of section 903(a), only the narrow strip of facilities physically touching the water can be maritime situses.

This circuit rejected this construction in *Alabama Dry Dock* in which the claimant was injured in a back lot. 554 F.2d at 178.[15] *See also Handcor Inc. v. Director, Office of Workers' Comp.*, 568 F.2d 143 (9th Cir. 1978) (adjoining terminal); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978); *Dravo Corp. v. Banks*, 567 F.2d 593 (3d Cir. 1977); *Dravo Corp v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977). The statute does require the injury to occur in an "adjoining area." The Senate Report's Summary of the amendments states that the bill extends coverage to "the contiguous dock area related to longshore and ship repair work." S. Rep. No. 92-1125, Cong., 2d Sess. 2 (1972). *See also* 118 Cong. Rec. S37283 (1972) (remarks of Sen. Eagleton) (identical language). Other statements in the legislative history merely repeat that the statute extends coverage to "adjoining areas." *See* H. Rep. at 10-11;[16] 118 Cong. Rec. S36271 (1972) (remarks of Sen. Williams); *id.* at H36381-82 (remarks of Rep. Daniels).

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16. The relevant portions of the House and Senate Reports are reprinted at note 8 *supra*.

15. In *Jacksonville Shipyards*, the pier-side warehouse in *Bryant* was probably right next to the water and therefore did not raise the question of whether it "adjoined" water. Although the fabrication shop or ship in *Nulty* was 300 feet from the ship under construction, the opinion does not indicate how far it was from the water.

[6] Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near."[17] "Adjoining" can mean "neighboring."[18] To instill in the term its broader meanings is in keeping with the spirit of the congressional purposes.[19] So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWA. To require absolute contiguity would be to reenact the hard lines that caused longshoremen to move continually in and out of coverage. It would frustrate the congressional objectives of providing uniform benefits and covering land-based maritime activity.

But even if we were to require strict contiguity, petitioners' construction would not prevail. The other key

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17. *See, e. g.,* Shorter Oxford English Dictionary 24 (1978); Webster's Third New International Dictionary 27 (1976); Funk & Wagnalls New Standard Dictionary of the English Language (1949).

18. Webster's New World Dictionary of the American Language —College Edition 18 (1960).

19. *See generally* G. Gilmore & C. Black, Jr., The Law of Admiralty § 6-50 at 424 (2d ed. 1975)

> "Adjoin" presumably means something like "border on" or "have direct access to" navigable waters; all the facilities mentioned, with the possible exception of "terminals," seem to meet that linguistic test. It is less clear whether the "adjoining area[s] customarily used . . . in loading, unloading, repairing, or building a vessel" must themselves "adjoin" navigable waters or whether it is sufficient that they "adjoin" piers, wharves, dry docks and so on. It may be assumed that the intent of the Congressional draftsman was to cover all employment-related injuries suffered by workers engaged in the specified activities. If that assumption is correct, "adjoin" should be broadly, not narrowly, construed; the essential test should be whether the injury occurred in the course of maritime employment and not on how close the situs of the injury was to the water's edge. Even on the level of linguistic analysis, the inclusion of "terminal[s]" in the first of the two lists may be thought to favor the broader construction of "adjoin."

Id. (footnote omitted).

word in the statute's phrase is "area." Area is a broad term, and the overall area within which the gear room was located does "adjoin" navigable waters. The question is where to draw the lines around the "area" in a given case. Although all of Houston is an "area" that "adjoins" navigable waters, to sweep that widely would be absurd. Conversely, fencelines and employers' designations will not, as stated above, end the factual inquiry. Fencelines and local designations are subject to manipulation for compensation purposes. Such a refusal to exalt form over substance is consistent with the Supreme Court's analogous rejection of union membership as the hallmark of status, *Caputo,* 432 U.S. at 268 n.30, 97 S.Ct. at 2359; *Pfeiffer,* 444 U.S. at 80, 100 S.Ct. at 336; and the Court's rejection of the "point of rest" theory. *Caputo,* 432 U.S. at 274-79, 97 S.Ct. at 2362-2365.

[7] The answer to the question of where the boundaries are to an "area" is found right in the statute. The perimeter of an area is defined by function. The "area" must be one "customarily used by an employer in loading, unloading, repairing, or building a vessel." The statute does not require that the area's exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity. The statute does not restrict coverage to only these areas used by the claimant's employer. It is an "area" if it is customarily used by any statutory employer. *Odom Construction Co., Inc. v. United States Dep't of Labor,* 622 F.2d 110, 113 (5th Cir. 1980).

[8, 9] In LHWA cases, this determination of whether a site is an "adjoining area" is handled by the ALJ and reviewed by the Board. The Act should be liberally construed in favor of injured workers, "in conformance with

its purpose, and in a way that avoids harsh and incongruous results." *Voris v. Eikel,* 346 U.S. 328, 333, 74 S.Ct. 88, 91, 98 L.Ed. 5 (1953); *see Caputo,* 432 U.S. at 268, 97 S.Ct. at 2359; *Jacksonville Shipyards,* 539 F.2d at 541. The ALJ is guided in his factual determination by the section stating that in the absence of substantial evidence to the contrary, LHWA coverage is presumed. 33 U.S.C. § 920(a) (1976). *See Jacksonville Shipyards,* 539 F.2d at 541. *Cf. Pittston Stevedore Corp. v. Dellaventura,* 544 F.2d 35, 48 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Corp. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977); *Stockman v. John T. Clark & Son,* 539 F.2d 264, 269-70 (1st Cir. 1976), *cert. denied,* 433 U.S. 908, 97 S.Ct. 2972, 53 L.Ed.2d 1092 (1977) (presumption of coverage applies to factual, not legal, questions). If the situs determination is supported by substantial evidence on the record as a whole, it will not be set aside by this court. *Jacksonville Shipyards,* 539 F.2d at 541, *citing O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508, 71 S.Ct. 470, 472, 95 L.Ed. 483 (1951) *and Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469, 478-79, 67 S.Ct. 802, 806-807, 91 L.Ed. 1028 (1947).

[10] In this case, the Avenue N gear room was not clearly outside the waterfront area customarily used by employers for gear rooms. *See* Appendix I. The ALJ found that the gear room operations were part of the on-going overall loading process. App. 15-16. He found that the gear room was "in the most desirable position for servicing the docks in the Port of Houston," and that the gear rooms of most stevedores were not on the docks proper. *Id.* at 11. The gear room was as close to the docks as was feasible. Substantial evidence exists to support a

finding that the Avenue N gear room was in an area customarily used by employers for loading. Not only does that area adjoin the navigable waterway, but the gear room itself has a sufficient nexus to the waterfront.

[11] We note in conclusion that in the *Jacksonville Shipyards* decisions the panel examined the precise place where the injury occurred rather than the broader area. Because the office building in the *Perdue* case was not "customarily used" for maritime purposes, the panel held the injury did not occur at a section 903(a) situs. From the facts supplied in *Perdue,* one cannot tell the nature of the overall area where the office was located. One might assume that the presence of intervening nonmaritime buildings would be an indication that the office was not in an overall area "customarily used" for maritime purposes. Exhibits petitioners supplied to the en banc court, however, indicate that the general area may have been so used.[20] Although in the case we now consider both the gear room and the overall area were "customarily used" for loading, *Perdue* calls to question the appropriateness of a broad interpretation of the term "area." What if the specific locus of the injury is not customarily used for maritime purposes even though the general area is so used? The requirement that the employee be engaged in "maritime employment" would not necessarily prevent coverage of injuries in such areas since the Supreme Court has stated that the employee need not be engaged in maritime employment at the time of the injury so long as part of his employment is maritime. *Pfeiffer,* 444 U.S. at 83 n. 18, 100 S.Ct. at 337 n.18, *Caputo,* 432 U.S. at

20. Aerial photographs, surveys, charts, demographic studies and exhibits such as Appendix I are extremely helpful in determining whether or not a particular site is within an "adjoining area." One picture may be clearer than a thousand words.

272-74, 97 S.Ct. at 2361-2362. The Supreme Court's rationale was that to do otherwise "would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." *Caputo,* 432 U.S. at 274, 97 S.Ct. at 2361-2362. The same rationale supports a broad interpretation of "area" since it will reduce the number of employees walking in and out of coverage. To the extent that *Perdue* indicates otherwise, it is overruled.

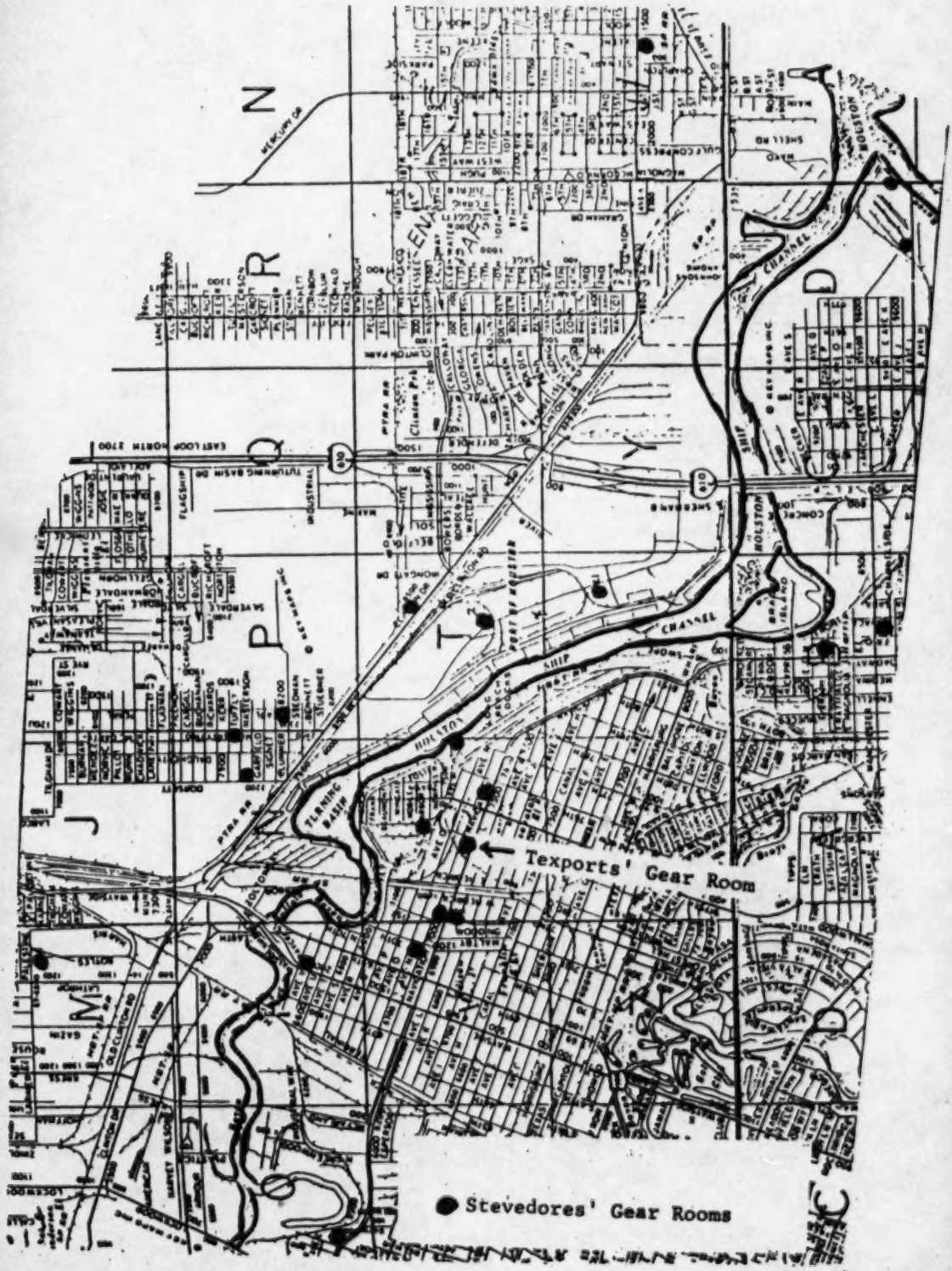
VI. *CONCLUSION*

Our construction of section 903(a) is consistent with the congressional purposes behind the 1972 amendments. A broad interpretation of the maritime situs requirement reduces the number of workers walking in and out of coverage and promotes uniformity.[21] It also is in line with the congressional desire to extend coverage to those maritime chores that technology has moved ashore. In addition, this interpretation is in keeping with the Supreme Court's expansive approach to interpreting the amendments' "employee" status test in *Caputo* and *Pfeiffer.* Furthermore, a broad view of the situs test has been adopted in other circuits. *E.g., Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137 (9th Cir. 1978); *Dravo Corp. v. Maxin,* 545 F.2d 374 (3d Cir. 1976), *cert. denied,* 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977). The finding of LHWA coverage is AFFIRMED.

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21. This "uniformity" does not mean that Congress has preempted state compensation remedies with the 1972 amendments. The Supreme Court has held that the LHWA is a concurrent, not an exclusive, remedy. *Sun Ship, Inc. v. Pennsylvania,* ____U.S. ____, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980). The Court indicated that the "jurisdictional compass" of the LHWA will be somewhat vague, *id.* at ____, 100 S.Ct. at 2438, a further indicator that a case-by-case approach to situs is not out of step with the spirit of the amendments.

APPENDIX I



APPENDIX I—Continued

TJOFLAT, Circuit Judge, with whom COLEMAN, Chief Judge, AINSWORTH, RONEY, GEE, JAMES C. HILL, GARZA and RANDALL, Circuit Judges, join, dissenting:

I respectfully dissent from the opinion the majority offers in this case.

This case is concerned solely with interpretation of the situs requirement of the two-part test[1] for coverage under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1976). The relevant portion of that statute is section 903(a), which in pertinent part reads:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). . . .

33 U.S.C. § 903(a) (1976).

In particular, we have been asked to delineate specifically the scope of the phrase "other adjoining area" found

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1. The two parts of this coverage test have been denominated the status and situs requirements. *See: P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 72, 100 S.Ct. 328, 332, 62 L.Ed.2d 225 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264-65, 97 S.Ct. 2348, 2357, 53 L.Ed.2d 320 (1977). *See also* the majority opinion in this case, *Texports Stevedore Co. v. Winchester*, slip op. at _____, at _____. The status test is enunciated in 33 U.S.C. § 902(3) (1976); its interpretation is not involved in this appeal.

in the parenthetical expanding the statutory definition of "navigable waters of the United States." The majority has responded to this request with an extremely imprecise situs rule:

> The best way to effectuate the congressional purposes is to determine the situs question by looking at all the circumstances.
>
> The situs requirement compels a factual determination that cannot be hedged by the labels placed on an area. . . . All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes. We would not extend coverage in this case do downtown Houston. The site must have some nexus with the waterfront. . . . So long as the site is close to or in the vicinity of navigable waters, *or in a neighboring area,* an employee's injury can come within the LHWA.

Texports Stevedore Co. v. Winchester, slip op. at ____-____, at ____-____ (emphasis added). The majority continues:

> The question is where to draw the lines around the "area" in a given case. Although all of Houston is an "area" that "adjoins" navigable waters, to sweep that widely would be absurd. . . . *The perimeter of an area is defined by function.* The "area" must be one "customarily used by an employer in loading, unloading, repairing, or building a vessel." The statute does not require that the area's exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity.

Id., slip op. at ____-____, at ____-____ (emphasis added).

Adoption of this broad and nebulous interpretation of the situs requirement is, in my judgment, inappropriate.

By failing to indicate clearly the parameters of recovery, the court is unfaithful to both the overall purpose of the Act and to the statutory language Congress employed to implement that purpose.

The Longshoremen's and Harbor Worker's Compensation Act, as its name indicates, is a workers compensation scheme. As such, it is geared toward a nonlitigious, speedy, sure resolution of the compensation claims of injured workers. *See, Guadet v. Exxon Corp.*, 562 F.2d 351, 356 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 414 (1978). The majority admits, however, that its interpretation of the Act's situs requirement will lead to a case-by-case determination of claims. *See Texports Stevedores Co. v. Winchester*, slip op. at ____ n. 21, at ____ n. 21. This result inevitably will hinder administration of the Act; it will engender uncertainty on the part of all parties and possibly arguably drain funds, through the increased costs of overbroad coverage and the ensuring litigation, otherwise available for compensation of those clearly contemplated by the Act: "It is obvious that extending the Act's coverage too widely must, of necessity, reduce the amount of funds available to improve the safety conditions for those most clearly coming within the Act—the pierside and shipboard longshoremen." *Sea-Land Service, Inc. v. Director*, 552 F.2d 985, 997 n. 23 (3d Cir. 1977). Surely the Act must be construed liberally to further its remedial, humanitarian purposes, *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 268, 97 S.Ct. 2348, 2359, 53 L.Ed.2d 320 (1977), but its construction must be practical enough to facilitate rather than impede achievement of the avowed purpose of the legislation. The majority's interpretation of the situs requirement solves only

Winchester's case; as respondent candidly admits, the adjoining area specified in 903(a) may well end one city block farther from the water than where Winchester was injured. Supplementary Brief for Respondent at 27. The majority does not clearly resolve that issue here. This court very probably will, however, be called upon in the future to decide that very issue; until then, those injured parties still in the dark about the extent of their federal compensation remedy will suffer added expense and unnecessary delay.

The majority, in my view, also misinterprets the language of section 903(a). Adjoining area, as used in the statute, refers to a particular site; it does not refer to a neighborhood in the vicinity of navigable water. The statute refers to "any adjoining pier, wharf, dry dock, terminal . . . or other adjoining area. . . ." The second mention of area, understood on the basis of common linguistic usage, refers to another sort or type of maritime situs, akin to a pier or wharf, for example, that adjoins navigable water.[2] It is to be understood as referring to a particular place, an individual site, not a broad region. *See Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137, 141 (9th Cir. 1978) (reaching a result contrary to that which this dissent would support, yet nevertheless reaching that result by reference to "adjoining area" in terms of a particular site rather than in terms of general neighborhood). Thus, our inquiry here should be whether the *gearroom* where Winchester was injured ad-

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2. Whether an "other adjoining area" need border an actually navigable body of water or merely border a pier or dry dock is something of a tautological inquiry: navigable water, by statutory definition, includes a pier or a dry dock, and thus adjoining such a site would be sufficient under the Act.

joins the water for purposes of section 903(a), not whether the gear-room is located in a neighborhood adjoining navigable water. Given this reading of adjoining area, even respondent admits that the Act would not provide for Winchester's recovery; at oral argument Respondent stated: "The gear-room itself, here, . . . does not, if we only look at the gear-room, it does not adjoin the water and hence it does not satisfy the situs test. . . . If the gear-room is the area, it doesn't adjoin." Tape of Oral Argument.

Furthermore, the majority errs by defining section 903 (a)'s limitation on recovery in terms of the functional character of an area. Section 903(a) is to be read as a *geographical* limitation on the extent of recovery allowed under LHWCA: "§ 3(a) . . . limits the geographic coverage of the Act . . ." *P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 78, 100 S.Ct. 328, 335, 62 L.Ed.2d 225 (1979). The Act provides compensation for injury occurring in an adjoining area; that the area is used in "loading, unloading, repairing or building a vessel" is a requirement for recovery *given* the condition precedent of the injury's occurrence within an otherwise covered area. Area is not defined by function, rather maritime function modifies or narrows coverage within the geographic area contemplated by the Act: "We reject the argument that the new Act [the 1972 LHWCA amendments] covers every point in a large marine facility where a ship repairman might go at his employer's direction." *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 542 (5th Cir. 1976) (referring to a "purely clerical and administrative" office located within a maritime terminal area). To approach the situs question as one determined solely by function is effectively

to read the situs requirement out of the Act, an inappropriate result.

It is clear that Congress intended to limit geographically the extent of coverage provided by LHWCA. As respondent states: "[T]he Act's coverage cannot follow [covered] employees regardless of where they go in the course of their employment, because the 'navigable waters' test was expanded rather than eliminated." Supplementary Brief for Respondent at 8-9. If Congress had wished to provide coverage for all injuries resulting from employment functionally related to maritime activity, regardless of locale, it could have eliminated the situs requirement from the statute. *See Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 223-24, 90 S.Ct. 347, 354, 24 L.Ed.2d 371 (1969). *See also Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934); *Jacksonville Shipyards v. Perdue,* 539 F.2d 533, 545 (5th Cir. 1976), *cert. denied,* 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977).

Since a geographical limitation on LHWCA coverage is mandated, I would draw the line illustrating that limitation with clarity to isolate sure, and statutorily defendable parameters of recovery. Implementation of the *Alabama Dry Dock & Shipbuilding Co. v. Kininess,* 554 F.2d 176, 178 (5th Cir.), *cert. denied,* 434 U.S. 903, 98 S.Ct. 299, 54 L.Ed.2d 190 (1977) contiguity test would achieve that goal: "The test is whether the situs is within a contiguous shipbuilding area which adjoins the water." This test also comports with the intent of Congress: "The bill also expands the coverage of this Act to cover injuries occurring in the *contiguous* dock are related to longshore and ship repair work." S. Rep. No. 92-1125, 92d Cong., 2d Sess., 2 (1972) (emphasis added).

The argument may be made that the *Alabama Dry Dock* test will exclude from coverage a significant number of maritime workers. There are no statistics in the record to indicate the extent of exclusion if the contiguity test is employed. In any event, given section 903(a)'s geographic limitation on recovery, it is inevitable that some maritime workers, engaged in admittedly maritime related activity, will be excluded from LHWCA coverage. It is within the purview of Congress to assess the impact of this exclusion. Our task is to articulate the test that realistically illustrates the scope of LHWCA coverage given the Act's purpose and the statutory language. We should not shy away from that task because of a judicial recognition that perhaps Congress has effectively excluded more workers from coverage than proper given the realities of modern maritime work. We should avoid overly broad, legislative holdings. "The invitation to move that line [of coverage]," to quote Justice White, "must be addressed to Congress, not to this Court." *Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 223-24, 90 S.Ct. 347, 354, 24 L.Ed.2d 371 (1969).

For these reasons, I dissent.

APPENDIX B

TEXPORTS STEVEDORE COMPANY,
and Texas Employers' Insurance Association,
Petitioners,

v.

Murl J. WINCHESTER and Director, Office of Workers' Compensation Programs,
U.S. Department of Labor,
Respondents.

No. 76-4100.

United States Court of Appeals,
Fifth Circuit.

Feb. 23, 1978.

Petition for Review of an Order of the Benefits Review Board (Texas Case).

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 20, 1977, 5 Cir., 1977, 554 F.2d 245).

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

TEXPORTS STEVEDORE COMPANY,
and Texas Employers' Insurance Association,
Petitioners,

v.

Murl J. WINCHESTER and Director, Office of Workers' Compensation Programs,
U.S. Department of Labor,
Respondents.

No. 76-4100.

United States Court of Appeals,
Fifth Circuit.

Dec. 16, 1977.

Petition for Review of an Order of the Benefits Review Board.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 20, 1977, 5 Cir., 1977, 554 F.2d 245)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

The following changes are being made in the opinion as published by withdrawing the next to last paragraph as it appears on page 3915, and substituting therefor the following language:

> "Respondent's accident did not occur on the dock or pier adjoining the Houston Shipping Channel but at a gear room which, though five blocks away, adjoined the docks and associated buildings. See *Alabama Dry Dock and Ship Building Co. v. Kininess,* 554 F.2d 176, 178 (5th Cir. 1977)."

In all other respects, the Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

APPENDIX D

TEXPORTS STEVEDORE COMPANY,
and Texas Employers' Insurance Association,
Petitioners,

v.

Murl J. WINCHESTER and Director, Office of Workers' Compensation Programs,
U.S. Department of Labor,
Respondents.

No. 76-4100.
Summer Calendar*

United States Court of Appeals,
Fifth Circuit.

June 20, 1977.

Petition was filed seeking review of order of the Benefits Review Board affirming award of benefits under Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals held that: (1) "gear man," whose job was to maintain and supply tools and machinery used by stevedores in loading and unloading ships, was a covered employee and (2) the situs test was satisfied notwithstanding that gear room was located five blocks from the nearest dock.

Affirmed.

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* Rule 18, 5 Cir.; *see Isbell Enterprises Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Petition for Review of an Order of the Benefits Review Board. (Texas Case)

Before GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM:

Under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901 *et seq.*, respondent, Murl Winchester, was awarded, inter alia, by the Administrative Law Judge his medical expenses incurred (or to be incurred) as a result of an injury sustained while working for petitoner, Texports Stevedore Company. The Benefits Review Board affirmed that decision and petitioner and its insurance company, Texas Employers' Insurance Association, appeal on two grounds. Specifically, the issues are (1) whether one, whose job it is to maintain and repair gear used in the loading and unloading of ships, is an employee within the meaning of § 2(3) of the Act, as amended, 33 U.S.C. § 903(3), and (2) whether a gear room, located approximately five blocks from the nearest dock, in an area utilized for gear rooms, is a situs within the meaning of § 3(a) of the Act, as amended, 33 U.S.C. § 903(a). On the basis of the statutes and the recent opinion, *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976), we affirm.

At the time of the accident, respondent had been a longshoreman for five years and had worked for petitioner for nine months. His position was termed "gear man" and his duties included supplying and repairing gear (i.e., tools and machinery) used by the stevedores in loading and unloading ships.

Texports maintained three "gear rooms" (facilities for the storage and maintenance of the gear) in the vicinity of the Houston Shipping Channel docks. Due to the lack of space at or near the docks themselves the third gear room, called the N Avenue gear room was located five blocks from the nearest dock.

Generally, each day respondent would report to the N Avenue gear room where he was given his daily work assignment. His work—which essentially consisted of maintaining, repairing, and supplying gear which was used in the loading and unloading of ships—was performed at each of the gear rooms, at dockside, and on board ships. His duties were not limited to times when Texports was engaged in its loading and unloading activities. Even when there were no ships to load or unload the gear rooms operated.

On June 3, 1974, while in the course of his employment for Texports, Winchester tripped and fell against a forklift, striking his face. On that date Texports was not loading or unloading any ship.

The two sections of the Act[1] cited in the statement of issues above set forth a coverage ". . . test which requires (1) that the claimant have been engaged in 'maritime em-

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1. The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker . . . 33 U.S.C. § 902(3).

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, buliding way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). 33 U.S.C. § 903(a).

ployment' and (2) that the injury have taken place upon the situs specified in the Act." *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533, 538 (5th Cir. (1976).

Judge Tjoflat explained in *Perdue* each prong of the coverage test. With respect to the first part he stated:

> . . . an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work. [Footnote omitted].

Supra, pp 539-540.

For the second prong Judge Tjoflat stated that the courts must:

> . . . examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel."

Supra, p. 541.

Generally, there are recognized standards the court of appeals applies in reviewing an appeal from the Benefits Review Board. Judge Tjoflat aptly stated:

> . . . The Act is to be liberally construed in favor of injured workers, see *Voris v. Eikel,* 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). We are also bound by a statutory presumption that an individual's claim comes within the Act's coverage. 33 U.S.C. § 920(a). Finally, we will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long as there is a reason-

> able legal basis for the Board's conclusions. See *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 403 (1951); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). [Footnote omitted]

Jacksonville Shipyards, Inc. v. Perdue, supra, p. 541.

Based on the facts and the test in *Perdue* we find that Winchester was properly determined to be an "employee" under 33 U.S.C. § 902(3). Although no ships were being loaded or unloaded on the day of the injury, Winchester's job of repairing and maintaing the gear used by the longshoremen was a continuous, direct involvement with maritime activities.

Respondent's accident did not occur on the dock or pier adjoining the Houston Shipping Channel but at a gear room several blocks away. Bearing in mind the test expounded by Judge Tjoflat in *Perdue,* it is clear that the N Avenue gear room, housing the gear used in loading and unloading cargo from ships, was a situs customarily used for maritime purposes as provided by the statute. Acknowledging the distance from the gear room to the water, we cannot, after giving the Act a liberal construction, reverse respondent's coverage just because the harbor area provided inadequate facilities for Texports to house their equipment.

Therefore, finding there was a legal and factual basis for the Board's decision, we affirm.

APPENDIX E

BRB No. 76-139

MURL J. WINCHESTER
Claimant-Respondent

v.

TEXPORTS STEVEDORE CO.

and

TEXAS EMPLOYERS INSURANCE CO.
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION

(Filed September 20, 1976)

Appeal from the Decision and Order of John I. Nevin, Administrative Law Judge, United States Department of Labor.

E. D. Vickery and W. R. Brice (Royston, Rayzor, Cook and Vickery), Houston, Texas, for the employer/carrier.

Ronald E. Meisburg (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Miller, Member:

This is an appeal by the employer/carrier from a Decision and Order (75-LHCA-318) of Administrative Law Judge John I. Nevin pursuant to the provisions of the Longshoremen's and Harbor Worker's Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

Claimant, a member of the longshoremen's union, was employed as a gear man by Texports Stevedore Co. The duties of a gear man include maintaining and repairing the equipment used by other longshoremen in the loading and unloading of vessels. A gear man also delivers this equipment to the docks and later recovers it. He may also go on board a ship to make on site repairs of the equipment. Gear includes such things as spreader bars, pallets, wire cable slings, tow masters and forklifts. Most of the mechanical repair and servicing of equipment is performed at the gear room at Avenue N which is 9 blocks from the gate leading to Wharf No. 3 at the foot of 75th Street and 5 blocks from the gate leading to the Long Reach Dock on Wharf No. 41. Texports owns two other gear rooms located on the wharves. The Avenue N gear room is situated so as to be convenient for the servicing of the various docks in the Port of Houston.

Claimant was injured in the gear room on Avenue N when he fell over a radiator and struck his face on a fork lift. He sustained facial lacerations and his nose was allegedly knocked out of line.

The administrative law judge found that claimant met the jurisdictional requirements of the Act. However, no compensation was awarded as the administrative law judge also found that claimant had suffered no compens-

able injury as there was no serious disfigurement. 33 U.S.C. § 908(c) (20). Employer had also paid claimant his full salary while he received treatment for his injury and had paid all of his medical expenses. However, the administrative law judge awarded an attorney's fee for establishing coverage under the Act and noted that employer is responsible for any future medical expenses the nature of the injury may require.

The employer/carrier (hereafter, the employer) appeal contending that claimant did not meet the jurisdictional requirements of the Act.

The standard of review for this Board as outlined in Section 21(b) (3) of the Act, 33 U.S.C. § 921(b) (3), and the law as summarized in *O'Keeffe v. Smith Associates,* 380 U.S. 359 (1965), require the Board to affirm the decision of a fact finder when that decision is supported by substantial evidence, is not irrational, and is in accordance with law.

To find jurisdiction under the Act, it must be established that Winchester was an employee under Section 2(3), that Texports was an employer under Section 2(4), and that the injury occurred on navigable waters as defined in Section 3(a). 33 U.S.C. § 902(3), § 902(4), § 903(a).

The Board has held that gear men are employees under Section 2(3) of the Act in that their activities constitute an integral and essential part of the overall longshoring operations. *Herron v. Brady-Hamilton Stevedore Co.,* 1 BRBS 273, BRB No. 74-171 (Jan. 23, 1975). The fact that employer was not working a ship dockside on the day of the accident is irrelevant. As long as claimant was participating in the overall continuing longshor-

ing operation, coverage would still exist. *See Caputo v. Northeast Marine Terminal Co.*, 4 BRBS 156, BRB No. 75-161 (Nov. 17, 1975), *aff'd*, No. 76-4009 (2nd Cir. July 1, 1976).

There can be no dispute that Texports is an employer under Section 2(4) of the Act. 33 U.S.C. § 902(4).

Section 3(a) requires that the disability must result from an "injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal . . . or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. § 903(a). The Board in *Vitale v. Maher Terminals*, 3 BRBS 467, BRB No. 75-267 (May 5, 1976), concluded that a gear room located across a public thoroughfare from a fenced in terminal was inside the Act's jurisdiction. In so finding, the Board noted that an adjoining area must be deemed bounded only by its use as a maritime enterprise. *Maxin v. Dravo Corp.*, 2 BRBS 372, BRB No. 75-145 (Oct. 30, 1975). The Avenue N gear room although five blocks from any wharf was placed in a location that would provide easy access for the gear men to service vessels on both sides of the channel. It clearly played an integral part in employer's overall maritime enterprise thereby qualifying as an adjoining area under the Act.

The Third Circuit in *Johns v. Sea-Land Service, Inc.*, No. 75-2039 (3d Cir. Aug. 5, 1976), has also recognized that longshoring under the statute is a "continuous process involving different employees, which continued at all times while the cargo was in maritime commerce as distinguished from land commerce." Accordingly, the court found, "The key is the functional relationship of

the employee's activity to maritime transportation . . ." for coverage under the Act to exist, the function being performed must be related to waterborne transportation, the jurisdictional nexus, rather than land-based activities. Clearly, claimant's duties at the gear room were directly related to maritime employment.

Further, the 1972 amendments to the Act were enacted in part to eliminate the circumstance of having persons engaged in maritime employment walk in and out of coverage during the workday. *Stockman v. John T. Clark & Son of Boston, Inc.*, No. 75-1360 (1st Cir. July 27, 1976); *Dellaventura v. Pittston Stevedoring Corp.*, No. 76-4042 (2nd Cir. July 1, 1976). A narrow reading of the situs requirement in the instant case would be contrary to this purpose of the Act.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

We Concur:

JULIUS MILLER
Julius Miller, Member

RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

RALPH M. HARTMAN
Ralph M. Hartman, Member

Dated this 20th day
of September, 1976.

CERTIFICATE OF SERVICE (Omitted)

* * *

APPENDIX F

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:

MURL J. WINCHESTER
Claimant

v.

TEXPORTS STEVEDORE COMPANY
Employer

TEXAS EMPLOYERS INSURANCE CO.
Carrier

Case No. 75-LHCA-318

OWCP NO. 8-25508

DECISION ON MOTION FOR RECONSIDERATION

(Filed As Part of the Record March 3, 1976)

The compensation order in this case was dated December 17, 1975, and was filed in the Office of the Deputy Commissioner on January 2, 1976. The motion to reconsider was received in this office on January 12, 1976, which is within ten days of the date the original order was filed. It is therefore timely (*General Dynamics Corporation v. Hines,* BRB 74-106, (April 16, 1974).

Reconsideration of our finding on the matter of jurisdiction is requested in the light of two recent decisions of U. S. Courts of Appeals (*Weyerhaeuser Company v. Gilmore, Docket* No. 74-3384, 9th Circuit, December

5, 1975; *I. T. O. Corporation of Baltimore et al. v. Adkins* et al, Docket 75-1051 4th Circuit, December 22, 1975).

We have carefully considered the holdings in the cases cited. We have considered the unsettled state of the law in view of the earlier holdings of the Benefits Review Board in cases arising in other jurisdictions which are to the contrary. We have also considered the absence of a decision on the question from the U. S. Court of Appeals for the Fifth Circuit which is the jurisdiction in which this case arose.

Our understanding of the law is that decisions of Federal Courts (other than the Supreme Court) are not binding on other Federal Courts of coordinate rank, or of inferior rank unless the latter owe obedience to the court rendering the decision (Moore's Federal Practice, vol. 1 63-67 citing *Strand v. Schmittroth,* 251 F.2d 590 (1957) Cert. dismissed 355 U.S. 886, 78 S.Ct. 258; *All State Insurance Co. v. Stevens,* 445 F.2d 845 (1971); *U. S. v. Mitchell,* 432 F.2d 354 (1970), cert. denied, 401 U.S. 910; Supreme Court Rule 19(1) (b)). Under such circumstances we believe that we must follow the precedents established by the Benefits Review Board insofar as they are not controlled by higher precedent in the jurisdiction in which the case at bar arose.

The motion is therefore denied.

John I. Nevin
Administrative Law Judge

Dated: 15 January 1976
Washington, D.C.

* * *

APPENDIX G

DECISION AND ORDER

(Caption Omitted)

(Filed As Part of the Record March 3, 1976)

Statement of the Case

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. Section 901 *et seq.*), hereinafter referred to as the "Act" and the rules and regulations issued by the Secretary of Labor under authority therein contained (20 C.F.R. 702.331), a hearing in the above-captioned matter convened on April 8, 1975, in the city of Houston, Texas.

All parties were afforded opportunity to be represented by counsel to adduce evidence, examine and cross-examine witnesses, and to file briefs. Based upon the entire record and from observation, and evaluation of the demeanor of the witnesses I make the Findings of Fact, Conclusions of Law, and Order as set forth herein.

Statement of the Issues

The primary issues presented relate to jurisdiction and disfigurement under the Act.

Statement of Facts

Murl J. Winchester was a longshoreman, and had worked as such for the previous five years. All of the Longshoremen in the area are members of the International Longshoremen's Association. There are five or

six different "locals". Claimant is a member of Local 1273. He may work either as a gear man or a longshoreman out of his local (Tr. 73-74).

The upper Houston ship channel is a highly developed port facility running a length of roughly 22,000 feet from the turning basin at Buffalo Bayou on to the turning basin at Sims Bayou; it lies along a general west-east axis. Both sides of the channel are lined with wharfs warehouses, and tank farms for handling various types of ocean freight (Res. Ex. 4, 17, 18, Tr. 88-92). Vehicular access to the north from the south side of the channel or vice versa may require traveling a substantial distance either east or west to reach a bridge and a corresponding east or west distance after crossing the bridge to reach the desired point (Tr. 53, 58, Res. Ex. 4, 16). Other facilities are located downstream from the upper channel, such as "Cargill" and "Equity", which are grain handling centers. Additional distances must be traveled to reach these areas from the Avenue "N" or wharf 43 gear rooms (Tr. 58-64, Res. Ex. 16).

On June 3, 1974, Claimant was employed by Texport Stevedores. At that time, he was a "gear" man (Tr. 15-16). He had commenced working for Respondent in September 1973 (Tr. 18).

The duties of a "gear" man are to care for, maintain, distribute, and recover for storage, the equipment used by stevedores in loading and unloading of vessels (Tr. 17, 81). Most of the mechanical repair and servicing of equipment is performed at the gear room on Avenue "N". Claimant's working day usually started at Avenue "N" (Tr. 68-69).

"Gear" includes such things as spreader bars, pallets, wire cable slings, tow motors, forklifts, etc. It is the equipment used by Stevedores to perform the loading operation (Tr. 20).

The "gear" room at Avenue N was at the intersection of Avenue N and 74th Street. It was nine blocks from the gate leading to wharf No. 3 at the foot of 75th Street. It was about 5 blocks from the gate leading to the "Long Reach Dock" or Wharf 41 (Tr. 17, 40-48, Res. Ex. 4-9).

According to management the primary function at Avenue N is automotive repai. and service and lift truck repair, and service (Tr. 94-95). But there is also a storage area for gear (Tr. 123).

This gear room is located in the most desirable geographic position for the servicing of the various docks in the Port of Houston with gear (Tr. 96, 118). It i close by the dock area on the south side of the channel and as convenient to the entire Port area as possible (Tr. 118-19). The gear rooms of other Stevedores are sometimes on the dock proper, but most are not (Tr. 22). They are all located as convenient to the docks as possible (Tr. 72-78, 119).

A second "gear" room owned by "Texports" is at Berth 3, or Wharf 43 (Tr. 48-50 Res. Ex. 4, 10). It contains pallets, wire cable, slings, or bridle, rope, towmotors etc. (Res. Ex. 12-15). There is not enough room for all of the Respondent's equipment at that facility (Tr. 19, 72, 97). Some repairs are performed here, but not many; it is primarily a storage area (Tr. 94).

A third storage facility or gear room was at Wharf 27, on the North side of the Houston Ship Channel (Tr.

51, 52, 94). It was capable of minor gear repair, but major work was brought to one of the other rooms (Tr. 52, 94).

As a gear man working for Texports, Claimant might have occasion to take gear to three or four ships working in the port on any given day. When this is done the gear is usually delivered to the dock along side the vessel where longshoremen hoist it aboard if necessary (Tr. 65-66, 99-100).

Occasionally, a gearman would go aboard a vessel to make a "spot" repair or to retrieve a forgotten piece of equipment (Tr. 19-23, 66-67, 79). A gearman does not actually engage in the handling of cargo in, or out of, a vessel (Tr. 67-68).

Texport was not working a ship on June 3, 1974. There was no occasion for any one gear man to go aboard a ship at that time (Tr. 100-105, 107 Res. Ex. 19). On June 4, two ships were being serviced (Tr. 105, 113); such ships may have needed gear for grain loading some of which was at Avenue N (Tr. 115). This gear must be ready and in order for use and would be made ready, including any needed repairs, by the gear men (Tr. 116). This was a continuous operation.

The Texport gear rooms are in overall charge of the operations superintendent whose basic responsibility is to oversee the loading and discharge of the vessels (Tr. 120-21).

Respondent's superintendent stated a "gear" man could be called upon to work at any of Respondent's "gear" rooms, or wherever else his duties took him. This would include repair of gear in a room; borrowing gear from

another stevedore; a pick up or delivery of gear from the ship; or even making a minor repair aboard ship (Tr. 129-31). All of the overall work performed is in support of the loading operation. It is customary, and necessary to the loading function (Tr. 130-34).

On June 3, 1974, Claimant was working for Texport (the employer herein) at the Avenue "N" location (Tr. 21). On that day he tripped over a radiator and fell into a forklift while enroute to getting equipment for loading pallets (Tr. 26). One of the scars which Claimant says he suffered as a result of the injury was described as a "one inch" scar ¾ inches below the eye. He also claims his nose was out of line, and had a small scar on it. His lip also was claimed to have a small scar on it (Tr. 28-32).

Claimant was treated for his injury by Dr. McMillan. Claimant never consulted him concerning scarring on his face, or the "deviation" of his nose (Tr. 39-40).

Dr. McMillan testified that he had treated Claimant for facial lacerations as a result of an injury on June 3, 1974. Upon examination no depressed fractures or other major difficulties were found and the cuts were sutured. These cuts were a three centimeter laceration under the left eye, an abrasive-like laceration on the left side of the nose of one and ½ centimeters in length, and a one centimeter laceration above the upper lip. They were closed with a total of ten sutures, healing was normal and the sutures removed on June 10. There were no other complaints such as headaches etc. (Tr. 137-140).

Because of a prior injury, not otherwise relevant, which occurred on May 28, 1974. Claimant had then been examined by Dr. McMillan. At that time, he noted

that X-ray examination revealed a slight deviation of the nasal septum to the right. Claimant's subsequent condition after the June 3, 1974, injury as noted by the Doctor, was not such that (by reason of the pain, examination by palpation, or noticable facial derangement), warranted additional X-rays (Tr. 140-47).

As a subsequent visit, on March 18, 1975, Claimant was complaining of a cold. The Doctor noted, from external appearance, no difference in position of Claimant's nose from that which existed prior to the June 3, 1974 injury (Tr. 148-51, 53, 57-58).

Although Claimant does have some scarring that will remain with him. It was difficult even for the Doctor to see it at the hearing (Tr. 153-57).

Photographs of Claimant on his drivers license do not indicate any marked difference in "alignment" of his nose before the accident as compared to the alignment after the accident and observed at the hearing (Res. Ex. 1, 2, and 3, Tr. 34, 74-75).

Witness Harrison testified that he had known Claimant all his life and that prior to June 1974 he did not have a scar under his eye and his nose was not crooked (Tr. 77-78). Claimant's wife testified that scars on his face and the crook of his nose make his appearance different from that which it was before June 3, 1974, but she had difficulty in specifying the particular area at the hearing (Tr. 84).

Personal observation at the hearing showed that Claimant's scars at that time were not readily apparent to the writer.

Claimant did not file a claim for disability; did not lose anytime from work; (he was kept on the payroll at full salary); and all medical expenses to date have been paid (Tr. 13, Cl. Ex. 6). Claimant's average weekly wage at the time of the injury was $302.04 (Cl. Ex. 6).

Conclusions of Law

Historically the vessel and her owners were liable for injuries received by a seaman in consequence of the unseaworthiness of the ship, or of a failure to supply and keep in order, the proper appliances appurtenant to the ship (The Osceola, 189 U.S. 158, 23 S.Ct. 483 (1903). This duty extended to providing safe appliances to seamen when and where the work was to be done (*Mahnick v. Southern S. S. Co.*, 321 U.S. 961, 64 S.Ct. 455 (1946). It was also extended to stevedores working on board ship (*Seas Shipping Company v. Sieracki*, 328 U. S. 85, 66 S.Ct. 872) and to a carpenter performing minor repairs on a loading device while on board ship (*Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S.Ct. 202 (1953). The rationale was that the work performed, and not the label of "Stevedore; or Carpenter" determined its relationship to the ship and to the historic doctrine of unseaworthiness. Thus the repair of a loading device was recognized as a necessary part of the loading process. (*Alaska S. S. Co. v. Peterson*, 347 U.S. 396, 74 S.Ct. 901 (1954). And, defective loading devices were subject to the doctrine of unseaworthiness even when they were brought aboard the vessel by an independent stevedoring contractor, and were not inherently part of the ship's equipment (*Alaska S. S. Co. v. Peterson, supra*). Furthermore, the doctrine is to be broadly construed, so as not to exclude from its scope the use of modern labor

saving methods and modern machinery in the traditional work of loading and unloading vessels. Nor should the application of the doctrine be defeated by the use of intermediate employers, or by a division of labor, which would strip the men performing the service of loading the ship of its historic protection. (*Spann v. Launtzen,* 344 F.2d 204 (1965) and cases cited therein).

Although we are not directly concerned with the "unseaworthiness" doctrine in the case at bar, its application to the loading process provides guidance as to the parimeters of that activity in determining whether the present Claimant was a "maritime" employee engaged in maritime employment. The duties of obtaining and recouping gear are part of the loading process. So also, the duties of performing minor repairs to equipment used in the loading process is part of the loading process. The distinction as to the type of work performed by Claimant is one that arises out of the division of labor practiced by the employer. It does not change the nature of the employment. It is axiomatic that modern machines and equipment need servicing and that their utility depends upon their being serviced and then made available at the required time and place. The loading process could not proceed without them. The choice of a "gear" room as the operating base from which to provide this service does not change the maritime nature of the employment. Thus, the Claimant satisfied the status requirement of the Act (*Vinciquerra v. Transocean Gateway Corp.*, BRB 75-125 (June 5, 1975); *Herron v. Brady Hamilton Stevedore Co.*, BRB 74-171 (January 23, 1975) 1 BRBS 273).

Since the Claimant was engaged in maritime employment at the time of his injury, it follows that the em-

ployer was one "any of whose employees are engaged in maritime employment (33 U.S.C. 902(4); *Kelley v. Hancor,* BRB 74-165 (Feb. 28, 1975).

As to the place of work, or situs, we first note that it has been held that a vehicular accident occurring on a public street outside of the terminal property when the Claimant was delivering cargo from one terminal to another nearby as covered. It was held the Act does not require that the injury occur on property owned by the employer. It is sufficient if it occurs in an "adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel. Such an area is one which is directly related to and an essential part of the employer's longshoring operations (*John v. Sea-Land Service Inc.,* BRB 75-124, (July 11, 1975); *Vinciquerra v. Transocean Gateway Corp.,* BRB 75-125 (June 5, 1975), *supra*). The construction of the word "adjoining" must be a broad one and not restricted to an area immediately adjacent to navigable waters, so as to avoid the possibility that an employee would be moving in and out of coverage under the Act during his working shift (*Perdue v. Jacksonville Shipyards, Inc.,* BRB 74-200 (January 31, 1975).

We conclude that the gear room at Avenue N was and is an adjoining area customarily used by the employer in loading or unloading vessels. It's location outside a terminal proper is not significant. The significant factor is that, considering the geographical layout of the Houston Ship Channel area, it is peculiarity well adapted to service vessels all over the area and on both sides of the channel. It is thus an area which is directly related to and an essential part of the longshoring operation conducted by

the employer. To hold that claimant is not covered there, while he would have been covered if injured on the docks or aboard a vessel, would result in his passing in and out of coverage, the very condition which is found abhorrent to the framers of the Amendments to the Act.

The subject of disfigurement is covered in Section 8 of the Act (33 U.S.C. 908C(20). It is a form of compensation based on permanent and partial disability payable in addition to compensation for temporary total or temporary partial disability. The precise language of the Act as amended reads:

> "Proper and equitable compensation not to exceed $3,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment."

Payment for disfigurement is a "schedule" item and not conditioned upon any loss of wage-earning capacity.

The Benefits Review Board has construed the quoted language to mean that an adverse affect on the Claimant's ability to secure or maintain employment need only be shown in cases of serious disfigurement of areas normally exposed, other than the head, face or neck (*Skipper v. Jacksonville Shipyards, Inc., et al.*, BRB 74-213 (June 11, 1975); *Wooham v. U. S. Navy Exchange et al.*, BRB 75-105 (August 20, 1975). An award based on disfigurement of the head, face or neck need only be "serious" to be supportable, thus, where a conclusion based on personal observation, was to the effect that a residual facial scar was not "noticeable and therefore was not a "serious" disfigurement, a denial of compensation was proper (*Fra-*

zier v. Southern Carolina Stevedoring Corp., BRB 74-198 (April 11, 1975).

In the absence of "serious" disfigurement, there is no permanent partial disability and hence no compensable injury (*Frazier v. Southern Carolina Stevedoring Corp., supra,* 33 U.S.C. 908(d) 20).

We find that there is no "serious" disfigurement in the case before us. Our finding is based on our personal observation as well as the demeanor of other witnesses while observing Claimant and testifying on the subject. We cannot therefore make an award of compensation on this ground. Such residual scarring as Claimant may have is certainly not "serious" within the meaning of the Act.

In the absence of any claim for disability due to the injury aside from disfigurement, and in view of the fact that Claimant had not lost any time from work; had not suffered any loss of income; and had received all medical benefits which his condition to date has required, there is no compensation due and unpaid to which a 10 percent penalty for failure of prompt payment, or an assessment of interest would attach.

The Benefits Review Board has held that Section 28 of the Act (33 U.S.C. 928) conditions any award of fees for legal services rendered by Claimant's attorney upon the successful prosecution of a claim. For this purpose, "compensation" has been held to include medical benefits to which the Claimant may be entitled as well as to a money allowance for injuries and funeral expenses. The successful establishment of jurisdiction is such a benefit contemplated by the Act from which attorney fees may flow. This is so because although no

present need may exist, the right to future medical care, if such a need ever arises, is a real benefit (*Brattoli v. International Terminal Operating Co.*, BRB 74-222, (July 11, 1975), and cases cited therein.

Claimant has requested a fee of $775 and an allowance of expenses of $75 based on total services of 11 hours before us and 4½ hours before the Deputy Commissioner. The hours claimed and the rate are concededly reasonable (Res. Brief p. 20). We find that the work involved in establishing coverage, or jurisdiction, under the Act was a substantial portion of the total effort and that the result constituted a benefit to Claimant justifying an attorney's fee. The request of $850 as an attorney's fee and miscellaneous expense is therefore approved and shall be paid by Respondent directly to Claimant's attorney when this order becomes final.

ORDER

The claim for permanent and partial disability based on "disfigurement" is denied.

Claimant is entitled to receive such medical benefits under the Act, in future, as the nature of his injury and the process of recovery may require.

An attorney's fee with related expenses in the sum of $850 is approved and shall be paid by Respondent di-

rectly to Claimant's attorney when this order becomes final.

John I. Nevin
Administrative Law Judge

Dated: 17 December 1975
Washington, D.C.

CERTIFICATE OF SERVICE (Omitted)

* * *

APPENDIX H

Excerpt from *Prolerized New England Company v. Benefits Review Board*, ____F.2d____, 12 B.R.B.S. 808, at 818 (1st Cir. Dec. 23, 1980):

> McNeil fell from the 8-Y conveyor leading to the Prolo Mill, approximately 1000 feet from the water's edge. To receive compensation, he must have been injured "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading . . . a vessel." 33 U.S.C. § 903(a). The Board held that McNeil was injured on a covered situs, reasoning that: "Claimant's injury was sustained at a site immediately next to the mill and near the dock and loading facilities adjacent to the Mystic River. It follows that claimant was injured on an adjoining area customarily used by an employer in loading a vessel."
>
> This analysis leaves much to be desired. Plainly, the site of the injury must adjoin navigable waters, not a loading area as the Board would seem to have it. *Stockman, supra,* 539 F.2d at 272. The situs requirement is not satisfied merely because the injury occurred "near" a covered area. Even if "near" were enough, it is questionble that the Board could be sustained on its analysis since McNeil was injured several hundred yards away from the dock, and the 8-Y conveyor from which he fell, viewed functionally, was far removed from the loading of ships.
>
> While we find the Board's approach inadequate, considerations of policy nevertheless lead us to uphold its decision. *Caputo* made clear that a covered "adjoining area" need not be entirely devoted to

shiploading. Assuming that the statutory phrase "customarily used . . . in loading" modifies "terminal" as well as "adjoining area" the Court held an entire terminal facility covered when one of its two fingerpiers was used to load and unload vessels. *Caputo, supra,* 432 U.S. at 281. A similarly expansive construction of "adjoining area" is necessary in this case to avoid resurrecting the evil of shifting coverage that Congress sought to avoid in the 1972 amendments. A crazy quilt pattern of situs coverage tracking the indistinct line between Prolerized's manufacturing and loading operations would produce uncertainty and confusion for employer and employees alike. We therefore conclude that McNeil's injury in an adjoining area used for both loading and manufacturing met the situs requirement.